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No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

MRS. JULIA CAROLINE SPONENBARGER ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 376–390) is reported in 21 F. Supp. 28, and its opinion on motion for a new trial (R. 92–94) is reported in 21 F. Supp. 895. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 410–421) is reported in 101 F. (2d) 506.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on February 9, 1939 (R. 421). A petition for rehearing was denied on February 27, 1939 (R. 425). The

petition for a writ of certiorari was filed on May 26, 1939, and granted on June 5, 1939. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in the circumstances of the present case, the United States has "taken" respondent's property within the meaning of the Fifth Amendment, and has thereby become liable to pay just compensation therefor.[1]

STATUTES INVOLVED

The relevant portions of the statutes involved are set out in the Appendix, *infra*, pp. 78–93.

STATEMENT

This suit, which was brought under Section 24 (20) of the Judicial Code, was begun by the filing of a petition on August 11, 1934, by respondent Julia C. Sponenbarger (R. 4–16). In general, the petition alleged that by the Flood Control Act of 1928 and certain acts of the United States in connection therewith, respondent's land had been damaged, and that the usefulness, enjoyment, and value of her property had been destroyed. Compensation was sought for the taking (R. 5, 15–16). A demurrer to the petition (R. 17) was overruled (R. 18), and the United States answered (R. 77–

[1] Respondent may urge that the judgment may be supported under Section 4 of the Act of May 15, 1928, *infra*. This question is also considered in this brief.

80). Certain interveners were made parties upon the motion of the United States (R. 25), and thereafter entered appearances (R. 28, 30, 32, 52, 66).[2]

The District Court, after a full trial, made extensive findings of fact and conclusions of law (R. 389, 350–366, 368–375), and filed an opinion (R. 376–390). These findings may be summarized as follows:

Location and character of respondent's property.—The respondent is the owner of 40 acres of land in Desha County, Arkansas, situated about two miles west of Arkansas City and the Mississippi River (R. 357). It is in the so-called "middle section" of the alluvial valley of the river (R. 352). The land lies in the basin of the Boeuf River, which rises in the northern part of Desha County and flows south to the Ouachita River in Louisiana. This natural basin, which is part of a larger basin known as the Tensas Basin, lies between the Macon Ridge on the east and the highlands on the west, forming a natural floodway for water from the Mississippi River on the east, and the Arkansas and White Rivers to the north (R. 357).[3] All property

[2] We do not discuss these other respondents—lienors or claimants of the property—for the reason that their rights depend entirely upon the rights of respondent Sponenbarger. The District Court, for that reason, made no findings with respect to them (R. 389).

[3] For the convenience of the Court, p. 94, contains a general map of the Tensas Basin, lying between the Arkansas River on the north, the Mississippi River on the east, and the Red River on the south. In addition, nine

in the basin lies in the natural high-water bed of the Mississippi River and has always subject to the servitude of flooding (R. 354, 356, 357).

Respondent's land has been repeatedly overflowed by deep high water, and has never been entirely free from overflow nowithstanding the construction of strong levees (R. 357). The land was flooded in 1912, 1913, 1919, 1921, and 1922, and in 1927 the buildings and improvements on the land were destroyed by the flood of that year, which inundated the land to a depth of 15 or 20 feet (R. 357–358, 362). All improvements located on land immediately behind levees along the main stem of the Mississippi River, including those of respondent, are at all times of the flood stage of the river subject to extreme hazards (R. 363). They have no assurance against destruction by the breaking of the levees and the natural crevassing due to the floodwater, irrespective of the height and strength of the levee (*id.*). Moreover, it is impossible to predict accurately what stages a flood may reach (*id.*).

The Jadwin flood-control plan.—Following the disastrous and unprecedented flood of 1927, which caused general devastation in the area where this land is situated, the Chief of Engineers of the Army, Major General Edgar Jadwin, recommended to the Secretary of War a plan for flood control on

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copies of a detailed map showing the territory have been filed with the Clerk.

the Mississippi River and its tributaries (R. 358). This plan, known as the Jadwin plan, was transmitted by the Secretary of War to the President, and by him to Congress (H. Doc. No. 90, 70th Cong., 1st Sess.) (R. 353.)[4]

The Jadwin Plan was a comprehensive one, dealing with the whole alluvial valley, and designed to protect it against the greatest foreseeable flood (R. 353, 354–355). It proposed to combine several devices to that end. Levees were to be strengthened and raised slightly (R. 354). Lateral diversion channels were proposed as safety valves, in the form of floodways of two kinds, one headed by controlled spillways through which water could be diverted from the main channel of the river and the other headed by levees of lower grade than adjacent levees (designated as fuse-plug levees) over or through which water would escape into the floodways whenever it should overtop or crevasse them (R. 354).[5] By these floodways it was thought to

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[4] For the convenience of the Court, nine copies of this document, hereinafter referred to as the Jadwin Report, have been filed with the Clerk.

[5] The various terms may be defined, for present purposes, as follows: A *spillway* is a concrete or masonry structure in a levee, designed to pass water from a higher to a lower elevation by means of gates. The operation, thus, is fully controlled. A *fuseplug* is a portion of a line of continuous levee, usually of relatively lower height and weaker section than the rest of the levee, intended to be overtopped by water at a flood stage lower than that which would threaten the main levees, and to provide an entrance into a diversion channel or floodway designed to carry excess water, usually

relieve the congestion of the main channel of the river and to increase its safe flow capacity within the normal confines of the riverside levees. Jadwin Report, Secs. 3, 13–19. The water was intended to flow through leveed channels, thereby confining its spread within the floodways to a minimum (R. 356). The fuse-plug levee for the Birds Point floodway involved the lowering of the existing levees; in the others they were to remain unchanged. Channel stabilization and navigation improvement were a part of the general project (R. 354, 355).

The plan contemplated the creation of a floodway down the Boeuf River Basin, where respondent's land is located (R. 355). The Boeuf River bottom was selected for this overflow because it was thought to have the best width and to be the most suitably located to receive the water, was the most direct route, and was largely undeveloped swamp-land (R. 356). The entrance to the floodway was to be headed by a fuseplug levee at the then existing grade, corresponding to 60.5 feet on the Arkansas City gauge (R. 356, 357). The contiguous levees on the Mississippi and Arkansas Rivers were to be raised about 3 feet (R. 356). In order to limit the land in the Boeuf Basin that would be overflowed by excess floods, so-called guide levees were to be constructed, where natural ridges would not serve, on each side of the Boeuf River bottom, from the

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laterally from the main channel of the river. See H. Rept. No. 1072, Comm. on Flood Control, 70th Cong., 1st Sess., pp. 371, 372.

proposed fuse-plug levee to the lower Tensas Basin (*id.*). The west guide levee was to begin just below Rohwer and the east guide levee at Luna Landing, with the fuseplug levee, about 33 miles long, in between these two points (R. 356–357). (See Plaintiff's Exhibit 24, R. 396.) Since the purpose of the fuseplug was to provide an escape for excess water down the leveed floodway only when the flood volume should exceed the safe capacity of the main channel of the river (R. 354), the floodway would operate only when the water reached a height above 60.5 feet on the Arkansas City gauge (R. 356). That height had been reached only once, in 1927 (*id.*). The lands in the floodways were to receive better protection they had theretofore enjoyed, with the result that they were protected against any recorded flood that had occurred, except that of 1927, and possibly, those of 1912 and 1882 (R. 355).

Action taken pursuant to the Plan.—The Jadwin Plan was only tentative and general in character—a mere outline of flood control in the alluvial valley of the Mississippi River (R. 360). General Jadwin himself recognized that details of the design and location of the engineering works had yet to be worked out and recommended that the task be entrusted to the Chief of Engineers (*id.*). Congress, in the Flood Control Act of 1928 (Act of May 15, 1928, c. 569, 45 Stat. 534; U. S. C., Title 33, Sec. 702a) adopted the general engineering plan, but did not adopt all the features of the Plan, espe-

cially in view of the engineering differences between it and a plan submitted by the Mississippi River Commission (R. 352, 359). Section 1 of the Act provides, in part:

> That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in * * * House Document Numbered 90 * * * is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: * * *

Section 1 also provides for the creation of a Board (the Mississippi River Flood Control Board) to consider the differences in engineering detail between the Jadwin Plan and the report of the Mississippi River Commission, and to make recommendations to the President, whose decisions should be final. The Board reported on August 8, 1928 (Comm. Doc. No. 28, H. Comm. on Flood Control, 70th Cong., 2d Sess.), and on January 10, 1929, President Coolidge approved the construction of the guide levees in the Boeuf Floodway and the acquisition of rights-of-way for those levees (R. 379; Comm. Doc. No. 2, H. Comm. on Flood Control, 71st Cong., 1st Sess.). On July 1, 1929, a suit was begun by the United States to condemn certain lands (not involved here) for rights-of-way for these guide levees, and an injunction issued against

interference with the agents of the United States in taking possession of such lands (R. 129–130). No further proceedings were had, and on December 18, 1934, the suit was dismissed upon the motion of the United States Attorney (R. 130).

Thereafter, pursuant to the general authority of the Mississippi River Commission, independent of the 1928 Act, the levees on the south side of the Arkansas River (which had failed to provide protection against the 1927 flood) were reconstructed and raised, giving the Boeuf Basin additional protection; more protection, in fact, than ever theretofore enjoyed (R. 362). Moreover, by means of cut-offs the Mississippi River was shortened by 100 miles between Arkansas City and the Old River,[6] and its channel deepened by dredging (R. 360). As a result, the height of the river has been lowered 5 or 6 feet. In the flood of 1937 there was a 20 percent greater flow past Arkansas City (2,100,000 second-feet) than in 1929 (1,800,000 second-feet), with a five-foot lower stage (R. 360–361). The greatest improvement has been in the vicinity of the proposed Boeuf River fuseplug (R. 360), and has afforded additional protection to the land of respondent (R. 362). It was estimated

[6] The Old River is the channel by which the Red River flows into the Mississippi (see detailed map). The testimony upon which the finding is based shows that the 272 miles between the Arkansas and Old Rivers was reduced by 100.6 miles, including one natural cut-off made in 1929 (R. 241).

by a witness that the 1927 flood involved a flow of 2,460,000 second-feet (R. 261). This would indicate under the findings that a flood of similar proportions could now be carried without overflow at Arkansas City (see R. 360–361).

The Boeuf River Floodway, which was a separate and independent project provided for by the 1928 Act, was never begun (R. 358–359), due to "local opposition" and to injunction (R. 380). See *Hurley* v. *Kincaid*, 285 U. S. 95. No work was ever commenced on its construction and nothing has been done toward the prosecution of this part of the plan (R. 359). The guide levees were never definitely located as an engineering fact (R. 356), and nothing has been done toward their construction (R. 359). The levee has been left at the 1914 grade for a distance of about 60 miles, from Yancopin to Vaucluse, whereas the contemplated fuseplug levee was to have been only about 33 miles in length (R. 357). By the Act of June 15, 1936, *infra*, p. 89, Congress abandoned the Boeuf Floodway project, and in lieu thereof has provided for the Eudora Floodway (R. 358–359). The Boeuf Floodway is no longer considered a part of the plan for flood control[7] (R. 361).

Effect of the Plan on respondent's land.—The construction of cut-offs and channel stabilization and the reconstruction of the levees on the south

[7] According to the present tentative locations, as indicated by the map on page 94, respondent's land will also be in the Eudora Floodway.

bank of the Arkansas River, together with strengthening the levees elsewhere on the Mississippi, have resulted in a greater protection and security to respondent's land than it has ever before had (R. 362, 366). The work done in other localities pursuant to the 1928 Act has in no way reduced the levee protection to respondent's property or increased the flood hazard (R. 366). Whereas respondent's land was repeatedly subject to overflow prior to the passage of the 1928 Act, it has not been inundated since the passage of the Act despite the fact that three great floods, those of 1929, 1935, and 1937, have since occurred (R. 365).

Respondent's use, possession, and control of her land have not been interfered with or molested by the United States (R. 364). Neither it nor its officers have diverted any floodwaters into the floodway (R. 365). No additional servitude has been placed upon respondent's land (*id.*). There has been no interference with any drainage system that affects respondent's land (*id.*). Any depreciation on the market value of respondent's land from the 1926 price level has not been due to the passage of the 1928 Act, nor has it been the result of any action on the part of the United States through its officers, agents, or employees (R. 364).

On the basis of these findings, the District Court concluded, as a matter of law, that there had been no taking of respondent's property within the meaning of the Fifth Amendment (R. 368), and entered judgment for the United States (R. 94–96). The Circuit Court of Appeals, with Judge Wood-

rough dissenting, reversed the judgment and remanded the cause for further proceedings (R. 421).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred—

1. In holding that there was a "taking" of respondent's property within the meaning of the Fifth Amendment.

2. In rejecting the finding of the District Court, supported by the evidence, that the Boeuf Basin floodway had never been begun, and in making the contrary finding that it was 90 percent complete and in operative condition.

3. In rejecting the finding of the District Court, supported by the evidence, that the protection afforded the respondent's land had been increased since the passage of the 1928 Act, and in making the contrary finding that respondent's protection from floods has been decreased.

4. In failing to hold that the Boeuf floodway has been abandoned by the Act of June 15, 1936, and in making the contrary holding that the Boeuf floodway is in operative condition.

5. In holding that Congress, by the passage of the Flood Control Act of 1928, has adopted the Jadwin Plan as a fixed project in all of its essential features.

6. In holding that Congress, by the passage of the Flood Control Act of 1928, has assumed exclusive control of the fuse-plug levee, thereby exclud-

ing property owners from their rights of self-defense against floods.

7. In failing to hold that respondent's land was subject to a servitude of flooding.

8. In reversing the judgment in favor of the United States.

SUMMARY OF ARGUMENT

I

This is a test case for lands lying in the proposed Boeuf Floodway project; while respondent's lands are included both in the formerly projected Boeuf Floodway and in the proposed Eudora Floodway the effect of the latter project is not and cannot be an issue here. The lands in the Boeuf Floodway now have more flood protection than they have ever before received. In the event of a sufficiently severe flood her lands are almost certain to be flooded, but this was the case before. It would be a travesty upon the principle of "just compensation" to hold the Government liable for a taking because of conjectured flood waters when, from 1912 to 1927, the lands were six times flooded, while from 1928 to 1939 they have not once been flooded, although the latter period includes three great floods.

But even if respondent were somehow to show that the Boeuf project involved the taking of her flowage rights, she must in addition show that the taking has already happened. Admittedly the Boeuf Floodway was never completed and has been

abandoned under an Act of Congress. Respondent finds the compensable taking in various acts related to the entire flood-control project. None of these has involved any interference with her land or has increased its susceptibility to floods over its former condition. Respondent's position, in essence is that because the Government *once* intended to link the various projects with the Boeuf Floodway the land in that floodway must be held to have been taken though the project has been abandoned. This argument, if accepted, would impose an impossible burden upon the vast and difficult problem of Mississippi River flood control.

Since 1820 Congress has been concerned with the Mississippi floods. After 1883 the projects in general followed the principle of confining the river to levees, trusting that the water would cut a deeper channel and carry a greater volume. The disastrous flood of 1927, however, caused a radical change in flood-control methods. The Jadwin Plan and the Flood Control Act of May 5, 1928 adopted a broad and flexible engineering plan. Under that plan, as under all previous forms of control, there is full recognition of the necessity of a continual change in plans, as experience and the shifting problems of the river suggest modifications, minor or drastic.

There will, therefore, invariably be constant changes in flood-control plans. To impose liability on the United States simply because a plan was proposed and adopted, although not pushed to com-

pletion or an actual taking, would thrust upon flood control an impossible burden. The Boeuf Floodway, once projected and now abandoned, is over 125 miles long and is 15 miles wide. Respondent's arguments, pushed to their extreme, would impose a catastrophic liability upon the Government which has no basis in the actual steps taken in the flood-control program.

II

A. There has been no taking of the respondent's property within the meaning of the Fifth Amendment. The District Court has found, upon substantial evidence, that the Boeuf Floodway was never begun, that the guide levees, essential to its operation, were never constructed or even definitely located. Furthermore, the Boeuf Floodway project was abandoned by the Act of June 15, 1936, *infra*, p. 89, and is no longer considered a part of the navigation and flood-control program. The United States has not interfered in any manner with the respondent's use, possession and control of her land. That land, which has been frequently flooded in the past, despite the construction of strong levees, has not been reached by floodwater since 1927. No additional servitude had been placed upon it. Its physical situation remains unchanged. The levee protection has not been decreased, the riverside levee remaining at its 1914 grade for a distance of 60 miles, but has, indeed, been increased by the strengthening of levees on the south bank of

the Arkansas River and by the construction of cut-offs and channel stabilization in the Mississippi River. Any decrease in the value of respondent's land was not due to any act on the part of the United States but largely to extraneous factors, such as the low price of cotton, burdensome taxation, and the flood of 1927.

B. The passage of the 1928 Act did not effect a taking of property. *Willink* v. *United States,* 240 U. S. 572. Nor was there any taking by reason of the proclamations of the President approving the proposed policy and method of flood control and authorizing the construction of guide levees in the Boeuf Basin.

C. The contention of the respondent that a taking was effected by the purported assumption, by the United States, of control over the riverside levee, excluding her from the right of self-defense, is without merit. The Act contains nothing indicating such control. The District Court found that the Act did not restrict respondent's right of flood-fight. In any event, even if such control had been assumed, the United States has power to control the height of levees in the interests of commerce and navigation, without liability to landowners injured thereby. *Jackson* v. *United States,* 230 U. S. 1. Furthermore, such assumption of control by the United States would not have subjected the respondent to injury, since Section 1 of the Act specifically provides that, pending comple-

tion of the floodway, the land within it shall be protected by the United States.

D. The work done by the United States in the instant case did not effect a taking. *Jackson* v. *United States, supra; Hughes* v. *United States*, 230 U. S. 24. Far from increasing the flood hazard to respondent's land, the work done by the United States gave the land greater protection than it had ever theretofore enjoyed. The floodway has never been constructed. The guide levees are not "immaterial details" but are essential to the project and constitute almost the only difference between the Boeuf Floodway and the Eudora Floodway, in favor of which the former was abandoned. In the absence of guide levees no greater burden is imposed upon respondent's land than upon all land in the Boeuf Basin. The success of any contrary contention would compel the Government to purchase flowage rights over land which, after the construction of guide levees, would be protected from floods—a result patently not intended by Congress. Section 1 of the Act, *infra*, p. 80–81, contains the express mandate that all diversion works should be so built as to protect adjacent lands. Furthermore, no fuseplug exists. The riverside levee remains at the 1914 grade for a distance of 60 miles, while the proposed fuseplug was to be only 33 miles long. This was required by the last proviso of Section 1 of the Act. The existence of a fuseplug is not merely a matter of physical fact, but depends

largely upon intent, and the purpose to which a section of the levee is to be put.

The work done elsewhere along the river did not effect a taking of respondent's property. The projected Boeuf Floodway was a separate project included in the entire plan. There is no deterministic doctrine that a plan to take crystallizes into a completed taking as soon as the first shovelful of earth is turned. There must be at least work which constitutes an actual interference with property rights. A present apprehension of a future taking does not warrant the recovery of compensation. *Peabody* v. *United States,* 231 U. S. 530; *Portsmouth Co.* v. *United States,* 260 U. S. 327. Under the rule of those cases, no "abiding purpose" to take respondent's property could be shown in this case.

III

A. Section 4 of the Act, *infra,* p. 83, which provides that the United States shall "provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi", does not affect the liability of the United States in any way. It does not authorize any action against the United States but is merely a direction to Federal officers that flowage rights must be acquired before water is actually diverted.

B. Even if the Section undertook to establish a liability beyond the Constitution, it would be in-

applicable here. The language of the statute and its legislative history unite to show that it relates only to the case where (1) there is a deliberate diversion, (2) with the result, or reasonably predictable result, (3) that additional damage will result from floodwaters which would not otherwise have passed over the land.

C. Such has been the administrative construction, both by the President and the Chief of Engineers. It was explicitly reported to Congress which, in the Act of June 15, 1936, did not amend Section 4, but adopted the engineering modifications recommended by the Chief of Engineers. The administrative construction seems, therefore, to have been ratified.

Thus the respondent's remedy can only be under the Constitution and, as shown above, there is no liability on the part of the United States under the Fifth Amendment in the instant case.

ARGUMENT

I

THIS CASE AND MISSISSIPPI FLOOD CONTROL

The present proceeding is a test case (R. 217–219) brought to determine whether the United States has taken, and has thereby become liable to pay just compensation for, lands in the bed of the Boeuf Floodway project.

1. The lands of the respondent, it is true, lie both in the formerly projected Boeuf Floodway and in

the proposed Eudora Floodway. But, for the purposes of this case and at the present time, the Eudora Floodway is not in issue. Respondent's complaint (R. 4–16) makes no mention of any taking because of the Eudora Floodway. The case was tried solely on the theory that just compensation was due because of the Boeuf Floodway project. Respondent, as the District Court noted (R. 381), disclaimed any reliance on the fact that her land was also in the Eudora project. In the court below, respondent's brief (p. 15) argues that the Eudora project "is dead." Even if this were not the case, the Eudora Floodway at this moment is no more than a series of sketches and plans in the files of the Engineers Corps of the United States Army. Under present plans it will some day be constructed. But flood-control plans for the Mississippi shift their course fully as rapidly as does the river, and it is by no means certain that construction will ever be commenced. The suit, then, as respondent has confined it and as the facts require, is necessarily limited to the taking resulting from the Boeuf Floodway project.

2. Our argument will develop the propositions that there has been no taking of respondent's land, and that the flood protection is, on the contrary, better than the lands have ever before received. But even if respondent were somehow to show that flowage rights would have been taken under the completed Boeuf project, even though in fact

the land is better protected, she faces an equally difficult hurdle before a claim for just compensation can be established. She must in addition show that she can recover just compensation simply because her land is located in a *projected* floodway. The question here is plainly not whether property which lies in the bed of a complete and operative floodway is "taken" in the constitutional sense. Admittedly, the Boeuf floodway has not been completed, and never will be. Act of June 15, 1936, Section 2, *infra*, p. 89. Rather, the question here is whether, the floodway having been abandoned, there have been any acts by the United States which can properly be said to have constituted a taking of respondent's property and the property of other landowners similarly situated. None of the acts of the Government, as we understand respondent's argument and the opinion of the court below, would be urged as a taking if it were not that they were part of a plan which at one time included the Boeuf Floodway project. In short, because the Government *once* intended to link the various projects with the Boeuf Floodway, land in that floodway must be held to be taken even though the Boeuf project has been abandoned. We cannot believe, however, that the Constitution imposes a liability for property taken under a plan which has not been and will not be executed.

The far reach of respondent's position can best be illustrated against the background of a sum-

mary sketch of the history of Mississippi flood control.[8]

The Mississippi River serves as a drainage channel for almost two-thirds of the States. It flows for a distance of over 2,400 miles, from northern Minnesota to the Gulf of Mexico. By reason of its importance to navigation and commerce, it has been an object of Congressional attention since 1820.[9] Thereafter, continuous studies of the river and the accumulation of recorded data concerning its behavior and characteristics resulted in the extension of the interest of the United States to problems of flood control, both as such and as a factor in navigation. In 1871 Congress directed the Secretary of War to establish systematic, daily gauging of the river at certain points (16 Stat. 598). Federal participation in the work was extended in 1879. After Congress in 1875 had received a report from the so-called Levee Commission, which ascribed the failure of the existing levee system largely to the absence

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[8] The sources from which the information contained in the remainder of this statement has been drawn include, mainly: Statement of Brig. Gen. M. C. Tyler, now President of the Mississippi River Commission, made before the Flood Control Committee of the House of Representatives (84 Cong. Rec.—issue of May 3, 1939, pp. 7131–7133); H. Rep. No. 1072, 70th Cong., 1st Sess.; H. Rep. No. 1100, 70th Cong., 1st Sess.

[9] $5,000 was then appropriated to ascertain the most practicable methods of improving its navigation. Act of April 14, 1820, c. 44, 3 Stat. 562.

of coordination of local efforts, it created the Mississippi River Commission, which took over that task. Act of June 28, 1879, c. 43, 21 Stat. 37. The Eads plan, adopted in 1881, relied upon levees only; the plan was to confine the river within levees and thus to produce an automatic deepening of the channel by the action of the water. Gradually, by 1917, Federal participation in flood control was the uniform policy; it was, however, conditioned upon local contribution of substantial percentages of the cost of construction, maintenance and repair of levees. Act of March 1, 1917, c. 144, 39 Stat. 948.

The Mississippi River Commission, from its inception, followed the policy of "levees only",[10] and under that policy an enormous system of levees was constructed up and down the Mississippi River and its tributaries. Yet other policies were recognized as possible. Cut-offs, reservoirs, reforestation, and many other plans were considered from time to time, and rejected.[11]

In 1927 occurred the most disastrous flood on the Mississippi River in recorded history. Devastation was general in the entire valley. Almost at once came a demand for a radical change in methods of flood control. The Committee on Flood Control of the House of Representatives began hearings on

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[10] H. Rep. No. 1072, 70th Cong., 1st Sess., p. 83.

[11] *Id.*; also Tyler statement, *supra*, note 8, at 7132.

November 7, 1927, and sat for over three months.[12] The Committee on Commerce of the Senate likewise held hearings from January 23, 1928, to February 24, 1928.[13] Several hundred plans—feasible and fantastic—were submitted, and at least twenty bills. The conclusions reached were that the "levees only" system of the Mississippi River Commission was inadequate, and that spillways, diversion channels, reservoirs, and the like, should also be included in any comprehensive system. The culmination was the Flood Control Act of May 15, 1928 (*infra*, pp. 79–88).

Eight years later, further extensions and modifications were made in the 1928 plan. In 1935 and 1936 extended hearings were held before both Senate and House committees.[14] By the Act of June 15, 1936 (c. 548, 49 Stat. 1508), the 1928 Act was largely modified in accordance with further recommendations of the Chief of Engineers. Reservoirs, for example, which had played but a minor part in the Jadwin Plan, obtained far larger importance. And among other specific modifications of the Jadwin Plan, the projected Boeuf

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[12] See H. Rep. Hearings on Flood Control, H. Comm. on Flood Control, 70th Cong., 1st Sess., 7 Vol.

[13] See S. Hearings on Flood Control, S. Comm. on Commerce, 70th Cong., 1st Sess.

[14] See e. g., S. Hearings on Flood Control in the Mississippi Valley. S. Comm. on Commerce, 74th Cong., 2d Sess., on S. 3531 (Jan. 27–30, 1936); Hearings H. Comm. on Flood Control, 74th Cong., 2d Sess., on S. 3531 (Apr. 30 and May 1, 1936).

Floodway was authorized to be abandoned, and a new projected Eudora floodway was to be substituted for it.

There will, in other words, always be changes and improvements. No man has yet dared to assert that *the* plan for Mississippi flood control has been found—the plan which cannot be improved and will not be modified. Until a plan has gotten beyond the project stage—until there has been at least an actual interference with any particular land—Congress must have freedom to make the necessary changes.

Here respondent claims but $4,000 (R. 16). Respondent, however, owns but 40 acres, and the bed of the projected Boeuf floodway is over 125 miles long and 15 miles wide. See *Hurley* v. *Kincaid*, 285 U. S. 95, 100. There are already pending in the District Court for the Eastern District of Arkansas eleven other cases representing claims of over $100,000, and there are in the Court of Claims more than fifty cases representing claims of several million dollars, all based upon the same ground as the present action (R. 217–219). We submit that the Fifth Amendment to the Constitution should not be so construed as to require the United States to pay these claims, and probably many million dollars more, as the price of its conclusion in 1936 that the Boeuf project, which was deemed sound in 1928, but which was never begun, should be replaced with a better, Eudora, project; nor

should the Amendment be so construed as to make the cost of Federal participation so tremendous that it would have to be curtailed radically or even completely abandoned.

We believe that on the facts as shown by the record in the present case no taking has occurred, and that the United States has not become liable to respondent. We shall show, first, that there has been no taking within the meaning of the Fifth Amendment, and second, that there is no greater liability imposed upon the United States by statute.

II

THERE HAS BEEN NO TAKING OF RESPONDENT'S PROPERTY WITHIN THE MEANING OF THE FIFTH AMENDMENT

A. The Facts Show Added Protection to the Land, and That the Boeuf Floodway Project Has Been Abandoned

The basic facts here involved are contained in the findings of the District Court (R. 350–366, 389), made after a protracted trial. Those findings, if supported by substantial evidence, are, of course, conclusive upon the parties and have the same effect as the verdict of a jury.[15] *Wessel* v. *United*

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[15] Notice of appeal was filed on November 29, 1937 (R. 96). The case was, therefore, pending in the appellate court when the Federal Rules of Civil Procedure became effective. Rule 52 is, therefore, inapplicable. See *McCrone* v. *United*

States, 49 F. (2d) 137, 139 (C. C. A. 8th). When two different conclusions of fact may reasonably be drawn from uncontroverted evidence, an appellate court will not disturb the trial court's determination of the inferences to be drawn. *United States* v. *Gamble-Skogmo*, 91 F. (2d) 372, 374 (C. C. A. 8th). See also *Brothers* v. *United States*, 250 U. S. 88, 93; *Crocker* v. *United States*, 240 U. S. 74, 78; *United States* v. *N. Y. Indians*, 173 U. S. 464, 470; *Chase* v. *United States*, 155 U. S. 489, 500; *F. T. Dooley Lumber Co.* v. *United States*, 63 F. (2d) 384 (C. C. A. 3th); and *Hearst Radio* v. *Good*, 91 F. (2d) 555 (App. D. C.).

There is no dispute concerning the location or character of the respondent's land. It lies in the Boeuf Basin, which has always been a natural floodway of the Mississippi River (R. 354, 356, 357). It has been repeatedly overflowed by deep, high water, especially in the floods of 1912, 1913, 1919, 1921, 1922, and 1927, and has never been entirely immune from overflow, despite the construction of strong levees (R. 357–358, 362). In fact, any land lying immediately behind levees along the main stem of the Mississippi River is subject to extreme hazards at all flood stages, since there never can be assurance against the breaking and crevassing of levees by floodwater, regardless of their height and strength (R. 363).

States, 207 U. S. 61, 65; statement of William D. Mitchell, Chairman of the Advisory Committee, Cleveland Proceedings of the American Bar Institute, p. 379.

Nor is there dispute as to the acts of the United States. On May 15, 1928, by the Flood Control Act, Congress adopted the general engineering features of the Jadwin Plan, although it left many of its details to be settled by decision of the President. Section 1. *infra*, p. 79. On August 8, 1928, the Mississippi River Flood Control Board, acting pursuant to Section 1 of the Act, reported to the President who approved its general recommendations on August 13, 1928, and on January 10, 1929, approved its recommendation that guide levees be constructed in the Boeuf floodway, and that rights-of-way be acquired for them (R. 379). On July 1, 1929, a suit was begun by the United States to condemn certain lands, other than those involved here, for rights-of-way for these guide levees, and an injunction issued against interference with the agents of the United States in taking possession of such lands (R. 129–130). No further proceedings were had, and on December 18, 1934, the suit was dismissed upon the motion of the United States Attorney (R. 130).

Work was begun on the general flood-control program in 1928, and has been continued to the present. The Boeuf Floodway project, however, was never begun (R. 358). The guide levees were never definitely located (R. 356), and nothing was ever done toward their construction (R. 359). On August 11, 1934, when the present suit was filed, some of the other work had been done on the "middle section" (R. 379). The riverside levee on the east bank of the Mississippi River and a part of

the levee on the west bank had been raised 3 feet (R. 379). A section of approximately 60 miles on the west bank remained unchanged, at the 1914 grade; this section included the part which had been projected as the Boeuf fuse-plug levee, but also included some 28 miles not so projected (R. 357). (See Comm. Doc. No. 1, H. Comm. on Flood Control, 74th Cong., 1st Sess., p. 4; R. 142–143.) By the Act of June 15, 1936, *infra,* p. 89, Congress directed abandonment of the Boeuf Floodway project, and authorized another floodway—the Eudora Floodway—to be constructed in its place. The Boeuf Floodway is no longer considered a part of the navigation and flood-control plan (R. 361).

Finally, the findings are clear as to the effect upon the respondent's land of the conduct of the United States. It is undisputed that the United States has not interfered, in any way, with respondent's use, possession and control of her land, nor has any drainage system been affected (R. 364, 365). No act on the part of the United States or its officers resulted in the diversion of any flood waters into the proposed floodway or upon the respondent's land. No additional servitude has been placed upon it (R. 365). Since 1927, no water has reached the land (*id.*) Its physical situation remains unchanged. The work done in other localities pursuant to the Act has in no way changed or reduced the levee protection of her property (R.

366)—the levee remains at its original grade, and affords to the land at least the same protection that it has always had (*id.*) Indeed, this protection has been increased by the strengthening of the levees on the south bank of the Arkansas River (R. 362), and by the construction of cut-offs and channel stabilization in the Mississippi River, which had appreciably lowered the flood level of the river, with the result that despite great floods in 1929, 1935, and 1937 (R. 365), the land was not inundated. (R. 360–362, 365). And, although the evidence was in dispute, the District Court found on substantial evidence that any decrease in the value of the respondent's land since 1928 has not been due to the passage of the Act or to any action on the part of the United States pursuant thereto, but has been largely due to extraneous factors (R. 364) such as the general depression (R. 215), the low price of cotton (R. 213, 220, 222), burdensome taxes (R. 220, 221, 223), and the flood of 1927 (R. 229).[16]

On these facts, we submit that the conclusion of the District Court that there had been no taking was plainly correct. The land is subject to no addi-

[16] The Southeast Arkansas Levee District, where the respondent's land is situated, was overflowed, in 1927, by 15 to 20 feet of water which "swept from the cleared lands every vestige of improvement and practically wiped out of existence Arkansas City" (H. Rep. No. 1072, 70th Cong., 1st Sess., p. 275). The District, with an assessed valuation of $12,500,000 (*id.*, p. 41), suffered a property loss of over eleven million dollars (*id.*, p. 275).

tional flood danger; indeed, it is better protected than ever before. The floodway project which is supposed to amount to a taking has been abandoned.

The scope of respondent's claim may best be illustrated by supposing the not improbable contingency of another change in flood-control plans for the Tensas Basin. If the Government were to decide, on the experience of the last decade, that the straightening and deepening of the channel between the Arkansas and Red Rivers was itself sufficient protection, it is not unlikely that the Cypress Creek fuse-plug levee would be raised to the height of the other levees. There would, under those circumstances, be no conceivable basis for a claim that respondent's flowage rights had been taken. Yet, if the decision below were affirmed, she would already have received payment for a hypothetical taking which would never have materialized under the original plans, which was supposed to arise under a plan which had been abandoned, and which was contradicted by the plans actually put into effect. As the flood-control plans now stand, the decision below requires the United States to pay compensation to landowners who are now better protected than before; under possible future modifications of plans, the decision below becomes even more extraordinary, for the Government would have paid for perpetual flowage rights on a basis which was hypothetical at the time of suit and specifically contradicted by subsequent action.

To hold the Government liable for flowage rights, when the lands have not once been flooded since 1928, would be a travesty on the principle of "just compensation." In the 15 years from 1912 to 1927 the lands were six times flooded; in the 12 years from 1928 to 1939 the lands have not once been flooded, although the period included the three great floods of 1929, 1935, and 1937.

The Fifth Amendment is designed to protect against the uncompensated seizure of private property. It is not a penal clause designed to discourage governmental benefits to property. A landowner who is in fact benefitted cannot urge that his land has been taken because of conjectural fears which once arose under a project since abandoned.

While it is difficult to state precisely the basis for the contrary conclusion of the majority of the court below, apparently it proceeded upon the following assumptions: (1) That the flooding of respondent's land had become a "fixed fact" instead of, as formerly, a "casual and incidental happening" (R. 416); (2) that the Boeuf floodway was substantially completed and in operative condition (R. 418–419); and (3) that Congress has deprived the respondent of her right of flood-fight by assuming exclusive jurisdiction over the levee (R. 416, 420).

The respondent's contention, as summarized by both courts below (R. 387, 413) is that a taking was effected by the following: (1) The passage of

the Act of May 15, 1928; (2) the approval, by the President, on January 10, 1929, of the construction of guide levees in the Boeuf Basin; (3) assumption of control over the levee to the exclusion of respondent's right of "self-defense"; and (4) the acts of the Government in raising the levee above, below, and across the river from the levee protecting respondent's land, which is retained at the 1914 grade. The respondent also contended below that additional factors proving a taking were: The proclamation of the President of August 13, 1928, approving the "policy and method" of dealing with flood control, set forth in the report of the Mississippi River Flood Control Board (R. 128); the condemnation suit filed on July 1, 1929, described *supra*, pp. 8–9 (R. 129); and an injunction issued on that date in connection with that suit (R. 129–130). The date of the alleged taking was fixed at January 10, 1929 "or thereabout" (R. 239).

We will discuss the various acts of the United States or its agents, upon which the respondent or the court below relied, in chronological order.

B. The Passage of the 1928 Act, the Proclamations of the President, and the Condemnation Suit

1. The Act of May 15, 1928, *infra*, p. 79, "adopted and authorized" the engineering plan set out in the Jadwin Report, but at the same time directed the creation of a special board to report to the President on the differences between the Jadwin Report

and the Report of the Mississippi River Commission of November 28, 1927. The Board reported on August 8, 1928, recommending adoption of the Jadwin Plan. Comm. Doc. No. 28, H. Comm. on Flood Control, 70th Cong., 2d Sess. The President on August 13, 1928, approved the report of the Board; on January 10, 1929, he specifically approved construction of the guide levees in the Boeuf River basin (R. 379; H. Comm. Doc. No. 2, H. Comm. on Flood Control, 71st Cong., 1st Sess.).

On July 1, 1929, the United States filed suit to condemn land to be used for the guide levees in the Boeuf River basin; on the same day the District Court authorized entry by the United States and enjoined any interference with its taking possession (R. 129–130). However, due to local opposition and the injunction obtained in *Kincaid* v. *United States*, 35 F. (2d) 235, 37 F. (2d) 602 (W. D. La.), 49 F. (2d) 768 (C. C. A. 5th), reversed, *Hurley* v. *Kincaid*, 285 U. S. 95, construction was never begun. On December 18, 1934, the condemnation suit was dismissed on motion of the United States (R. 130).

2. We submit that under the decisions of this Court it is plain that no "taking" was accomplished by the passage of the statute, by the Presidential proclamations or by the condemnation suit.

In *Wilkins* v. *United States*, 240 U. S. 572, the Court was called upon to decide whether the adoption of a plan constituted a taking. The decision here follows *a fortiori* from that ruling. A harbor

line had been extended by the Secretary of War to include a portion of plaintiff's land. Congress had approved the project, had appropriated a sum of money to pay damages for the removal of the land, and a contract for that purpose was let. When the plaintiff wanted to rebuild his wharf he was prevented from doing so by the Government and ordered to remove the piling. Nothing tangible, however, to carry out the contract or to enforce the order was done, and eight years later the harbor line was changed again, this time omitting the plaintiff's land. The Court held (pp. 579–580):

> There was no actual taking of any of the claimant's property, nor any invasion or occupation of any of his land. * * * Something more than the location of a harbor line across the land was required to take it from him and appropriate it to public use. * * * No taking resulted from the request that he remove his facilities, for it was neither acceded to nor enforced. And the contract for cutting away a part of the land was also without effect, because there was no attempt at performance.

Again in *Bauman* v. *Ross*, 167 U. S. 548, this Court had before it a statute which provided that upon recordation of a map detailing plans of the Commissioners of the District of Columbia for the extension of a permanent system of highways, no further subdivision of land included in the area would be permitted, except in accordance with the

plan. Owners of property affected claimed that the recording of such a map, pursuant to the statute, effected a taking of their land. This Court did not agree, and held that the recording of a map does not restrict in any way the use or improvement of the land by its owners, prior to the actual taking, by condemnation or otherwise, of the land for highway purposes. See also *Shoemaker* v. *United States*, 147 U. S. 282; *Garrison* v. *City of New York*, 21 Wall. 196, 204; *Smith* v. *United States*, 32 C. Cls. 295, 309–311; *United States* v. *Holden*, 268 Fed. 223 (N. D. N. Y.). Cf. *Marion &c. Ry. Valley R. Co.* v. *United States*, 270 U. S. 280.

The respondent relied below upon *Hurley* v. *Kincaid*, 285 U. S. 95, as authority that a taking occurred when the Government commenced work on the project. That case clearly is not authority upon the point. There Kincaid sought to enjoin work on the Boeuf Floodway, contending that since his land, which was located in the proposed floodway, had not been condemned, the construction of the floodway would deprive him of his property without just compensation. Kincaid contended that there had been a taking and the Court stated (p. 103):

> We have no occasion to determine any of the controverted issues of fact or any of the propositions of substantive law which have been argued. * * * *We may assume that, as charged*, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of

> it—as soon as the Government begins to carry out the project authorized. * * * [Italics supplied.]

Clearly, this was the familiar practice of assuming the postulate most favorable to the party seeking relief for the purpose of showing that, even such under an assumption, he was not entitled to the relief. The holding of the Court was that Kincaid was not entitled to an injunction, because, even on that assumption, he had an adequate and complete remedy at law by a suit under the Tucker Act to recover just compensation. Indeed, the Court replied (p. 104), to the contention that the officers threatened to start work without acquiring flowage rights, that "the Fifth Amendment does not entitle him to be paid in advance of the taking."

So far as the passage of the 1928 Act and the Presidential proclamations approving the project as well as the plan to acquire the rights-of-way for the guide levees are concerned, *Willink* v. *United States* and *Bauman* v. *Ross* are conclusive.[17] And

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[17] The court below apparently attached some importance, as rendering the project "fixed" (R. 412), to an opinion of the Attorney General (36 Op. Atty. Gen. 80) given in answer to an inquiry by the Secretary of War. This opinion did no more than instruct the Secretary that the acceptance by Congress of the engineering plan of the Jadwin Report barred any deviations from the plan. The Attorney General expressly declined to render any opinion concerning the acquisition of flowage rights, for the reason that the question was then before the courts. This was in accord with the apparent intent of Congress, for in the debate of the bill in

the *Willink* case is equally conclusive as to the irrelevance of the condemnation suit, which was later dismissed. That suit, it should be observed, was intended to procure for the United States land to be used for guide levee rights-of-way (R. 129). Respondent does not claim that her land lies in any right-of-way for levees, nor that it has been interfered with in any way. The suit, in other words, even if respondent had been the owner of the lands sought to be condemned, is comparable to the contract in the *Willink* case—action looking to the carrying out of the plan, but entirely without effect because never pressed to the extent of an actual interference.[18] *Cf. In Re Condemnations for Improvement of Rouge River*, 266 Fed. 105, 115 (E. D. Mich.); *Marion Etc. Ry.* v. *United States, supra.* Here, when respondent's land was not the object of the suit, and was not affected by the suit in the slightest degree, plainly no claim of a taking can rest upon it.

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the Senate, Mr. Jones, author and sponsor of the Flood Control Act, stated, with respect to General Jadwin's contention that the land was subject to a natural flowage right in the United States, that "there would be a question there for the courts to determine" (69 Cong. Rec. 5486).

[18] Compare the power of the Government to dismiss condemnation suits without liability for just compensation, or to abandon a taking before possession has become permanent. *Bauman* v. *Ross, supra*, 598–599; *Owen* v. *United States*, 8 F. (2d) 992 (C. C. A. 5th); *Commercial Station Post Office* v. *United States*, 48 F. (2d) 183 (C. C. A. 8th).

C. Alleged Assumption of Control Over the Riverside Levee

The respondent also urges that the 1928 Act constituted a taking of her property because under it the United States purportedly assumed such control over the riverside levees as to deprive her of her right o flood-fight, or self-defense against floods by raising the height of the riverside levee. And in *Danforth* v. *United States,* 105 F. (2d) 318, decided by the Circuit Court of Appeals for the Eighth Circuit subsequent to the present case, with a different panel of judges sitting, the Court distinguished the present case from that then before it on the ground that in the present case the United States had assumed this control over the riverside levee. It is submitted that the contention that the United States has assumed control of the riverside levee, and the further contention that such an assumption of control would constitute a taking of property, are both without merit.

1. Nothing in the Act indicates an assumption of such control. The provisions of Section 14 of the Act of March 3, 1899 (c. 425, 30 Stat. 1152; U. S. C., Title 33, Sec. 408), which forbid interference with levees and other structures and which are made applicable by Section 9 of the 1928 Act, *infra,* p. 85, apply only to levees and other structures *built by* the United States, and consequently have no application to this levee, which was built by local interests (R. 14–15). A provision specifically giv-

ing to the United States the control which the respondent alleges to exist was in the original bill and was stricken out. See 69 Cong. Rec. 7114–7115.[19]

The District Court concluded that the Act did not restrict respondent's right of flood-fight (R. 388) and pointed out the fact that the property owners had exercised that right in the flood of 1937 (*id.*). The War Department has similarly construed the Act (Comm. Doc. No. 2, H. Comm. on Flood Control, 71st Cong., 1st Sess., R. 252), stating that—

> * * * the flood control project has a weak spot with reference to flood control in that there is no law preventing local interests from raising the so-called fuse plug levee at the heads of the Atchafalaya and Boeuf Basins. These interests have not been deprived by the United States of protecting themselves. * * *.

The conclusion of the court below to the contrary (R. 416) is, we submit, erroneous.

2. But, in any event, assumption of control of the levee by Congress would not subject the United States to liability. Congress has legislated and undertaken construction for the control of floods in the interest of navigation and commerce, as well

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[19] The necessity of such control had been emphasized in Section 420 of the Jadwin Plan. The court below seems to have assumed that it thereby became law when the Jadwin Plan was approved by the 1928 Act (R. 416). Plainly, however, Congressional approval was limited to "the engineering plan" of the Jadwin Report. See Sec. 1, *infra*, p. 79.

as in the interest of the general welfare of the entire United States. It has been held that under those powers the United States has the authority, without liability, to fix the height at which levees may be constructed. In *Matthews* v. *United States*, 87 C. Cls. 662, the Court of Claims held (p. 718):

> The United States had the right, without liability, in the exercise of its lawful authority to control navigation and navigable waters, to fix the height at which the riverside levee might be constructed—namely, at 58 feet, and plaintiff cannot sustain a taking because of this feature of the Flood Control Act * * *.

The same holding is implicit in the decisions of this Court in *Jackson* v. *United States*, 230 U. S. 1; and *Hughes* v. *United States*, 230 U. S. 24. In both of them the United States had by levee construction subjected the plaintiff's land to increased flooding, and that in both cases this was held not to constitute a taking. While it does not appear in either case that the United States had forbidden the plaintiffs to construct levees for their protection against the increased floods caused by the United States, it is plain that had the United States done so it would not have affected the result.[20] It would have been utterly impractical, both from the stand-

[20] Cases in which self-protection by the landowners, or other interested parties would wholly have thwarted the purpose of the Federal construction, but in which they were

point of costs and of engineering, for the landowners to have constructed levees to protect themselves from the higher waters caused by the United States,[21] and it is not reasonable to assume that the Court denied them relief because of the supposed existence of a right of self-protection which, it was obvious, could not have been used.

Moreover, as we have shown, even if the height of the levees had unalterably been fixed by the Act, respondent's land yet has even greater flood protection than before. The Fifth Amendment requires just compensation for property taken; it does not require payment for a wholly theoretical injury because of loss of control over levees placed on other land.

D. The Work Done by the United States Pursuant to the 1928 Act

Respondent also relies upon the fact that the United States has, since 1929, been proceeding with

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denied recovery, include *South Carolina* v. *Georgia*, 93 U. S. 4; *Gibson* v. *United States*, 166 U. S. 269, 276; *W. A. Ross Construction Co.* v. *Yearsley*, 103 F. (2d) 589 (C. C. A. 8th); Compare *Franklin* v. *United States*, 101 F. (2d) 459 (C. C. A. 6th), pending on certiorari, No. 27, October Term, 1939. And see Section 1, Act of June 22, 1936, c. 688, 49 Stat. 1570.

[21] It clearly so appears from the opinion in the *Jackson* case. See *Jackson* v. *United States*, 230 U. S. 1, 5–6, 13–14, 22. And the opinion in the *Hughes* case states that the general engineering situation was substantially the same in that case as in the *Jackson* case. See *Hughes* v. *United States*, 230 U. S. 24, 26 ff.

other navigation and flood-control work on the Mississippi River. Particularly, respondent relies upon the fact that the levees on both the east and west banks of the middle section of the river, except for a stretch of 60 miles on the west side which includes the projected Boeuf fuseplug levee, have been raised three feet above the 1914 level. The 60-mile section remains unchanged at the 1914 grade. We submit that no taking may be predicated upon these facts.

1. *Consequential Injury From Other Work on the River Would Impose No Liability.*—This Court has decided that no right accrues to a landowner when the United States increases the height or strength of the levees upstream and downstream from his land and on the opposite side of the river from his land, and thereby increases the susceptibility of his land to floods. *Jackson* v. *United States,* 230 U. S. 1. That case involved the "Eads plan" for the improvement of navigation and the control of floods in the Mississippi valley. The Eads plan was adopted by Congress in 1881, and it initiated large-scale Federal levee construction on the Mississippi. It involved the building (or maintenance) of continuous levees along both the west and east banks of the river and its tributaries from Cairo, Illinois, to the mouth of the river, except in stretches where natural ridges approached close to the river and served the purpose of levees. As the Eads plan contemplated the use of the power of the river to cut out a deeper channel, by confining its

waters within its banks, it necessarily involved raising the level of the river. The plaintiffs in the *Jackson* case owned plantations on the east bank of the Mississippi situated in a small basin between the river and a natural ridge. The plaintiffs had constructed levees to protect their plantations. The levees constructed or maintained by the United States under the Eads plan did not, however, include the plaintiff's levees, or any levee to protect their lands, for the reason that the cost of constructing or maintaining such a levee would have amounted to more than the value of the lands lying between the river and the foothills. The levee construction pursuant to the Eads plan, raised the level of the river and caused the levees protecting the plaintiff's lands to be washed away and subjected those lands to increased flooding, both as to frequency and depth. This Court held that upon these facts the United States had not taken the plaintiff's lands. After expressing doubt that the United States could be held solely responsible for the construction works, since the states and local agencies had collaborated with it, the Court held that in any event the United States had not taken the plaintiff's lands. It said (230 U. S. at 20):

> it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible.

and (230 U. S. at 23):

> * * * the plenary power of the United States to legislate for the benefit of navigation and to construct such works as are appropriate to that end, without liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open.

Compare *Matthews* v. *United States*, 87 C. Cls. 662; *Bedford* v. *United States*, 192 U. S. 217, 223–224.[22]

We believe that the *Jackson* case is directly in point, and is decisive.[23] There are other cases, however, which substantiate that conclusion. In *Hughes* v. *United States*, 230 U. S. 24, the United States had constructed a new levee which, instead of running in front of the plaintiff's property as the old levee had done, ran behind it. The plaintiff contended that the failure of the United States to build the levee as he demanded, in front of his property, subjected him to danger from increased stages of floodwater caused by the construction, by

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[22] This rule is not changed, so far as the land here involved is concerned, by the provisions of Section 3 of the 1928 Act, *infra*, p. 83, directing the Secretary of War, when necessary, to acquire floodage rights over lands "which are not now overflowed or damaged." It is undisputed that this land has been repeatedly subjected to overflow and damage in the past.

[23] The *Jackson* case stressed the plenary power of the United States to legislate in the interest of navigation, and to construct such works as are appropriate to that end. As we have pointed out above, p. 16, the same power was being exercised in the instant case.

the United States, of levees elsewhere along the river. The lower court allowed recovery, on the ground that the acts of the United States had, in effect, moved the plaintiff's property into the bed of the river, and had, in any event, imposed an additional servitude on the property by subjecting it to more frequent and more destructive overflows. This Court reversed, pointing out that plaintiff's protection from the old levees remained unchanged, and that the construction of the new levees elsewhere would not serve as a basis for complaint. It rejected the claims of the plaintiff, stating (p. 32) that they—

> * * * in their last analysis but involve the assertion of a right of recovery against the United States for failing to build a levee in front of the plantations in question for the purpose of affording them protection from the increased stage of high-water which it was asserted had been created by the act of the United States in building levees elsewhere along the river.

The argument there rejected seems indistinguishable from respondent's argument here. See, also, *Sanguinetti* v. *United States*, 264 U. S. 146; *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *United States* v. *Lynah*, 188 U. S. 445, 470-471; *Coleman* v. *United States*, 181 Fed. 599, 603 (N. D. Ala.); *Barr* v. *Spalding*, 46 F. (2d) 798, 801 (W. D. Ky.); *Marret* v. *United States*, 82 C. Cls. 1, 14, certiorari denied, 299 U. S. 545.

The *Jackson* and *Hughes* cases have been followed by the Court of Claims and the Circuit Court of Appeals for the Eighth Circuit—the same court which decided the instant case—in cases also arising under the 1928 Act and somewhat similar to that here presented. These cases are *Matthews* v. *United States*, 87 C. Cls. 662, and *Danforth* v. *United States*, 105 F. (2d) 318. In each of these cases the plaintiff's land was located in the Bird's Point Floodway, which was to be constructed by the building of a set-back levee some miles to the west of the riverside levee, and the reduction in height of the latter by three feet, so that in times of flood the river would overtop the riverside levee and flow in a much wider channel, part of which would be plaintiff's land. When the suits were instituted the set-back levees had been built, but the riverside levee had not been cut down. The courts denied recovery in both cases. Both courts pointed out that the only injury to which the plaintiff was subjected by the construction up to the time of suit was that the set-back levee would confine upon the plaintiff's land floodwaters which overtopped the riverside levee, and which otherwise would have spread out over adjacent land. Both courts held that there was no taking. Certainly, in the present case, since the floodway has not even been begun, the result must be the same.

2. *The Other Work Has in Fact Increased Respondent's Flood Protection.*—Actually, the posi-

tion of the respondent here is much weaker than that of the plaintiffs in the *Jackson, Hughes, Matthews,* and *Danforth* cases. In those cases the courts were willing to assume that the flood hazard to the plaintiff's lands had been increased. Here, however, the District Court found, on substantial evidence (R. 366; 238, 243), that the work done pursuant to the 1928 Act had in no way reduced the levee protection to respondent's property or increased the flood hazard thereto. Indeed, it found, upon substantial evidence (R. 238, 242, 243–244, 258, 260, 362), that the work of the United States since the 1928 Act in channel stabilization and cut-offs had afforded *additional* protection to respondent's land, and that the building and strengthening of the levees on the south bank of the Arkansas by the Mississippi River Commission, independently of the 1928 Act, had also afforded additional protection (R. 227, 251, 254–255, 362).[24] Taken as a whole, therefore, the activity of the United States in the middle section of the river has not increased, but has substantially decreased, the flood hazard so far as respondent is concerned. While under the cases above cited it would be wholly irrelevant if her land, which has frequently been flooded in the past, has been subjected to some conjectural increased liability to

[24] It was the breaking of the levees on the south bank of the Arkansas that flooded the Boeuf Basin, including the respondent's land, in 1927 (R. 362).

flooding (see *Sanguinetti* v. *United States*, 264 U. S. 146, 149), the fact is that here the contrary is the case. It would be strange indeed if liability for a taking could be asserted in these circumstances.[25]

The court below, without directly challenging the indisputable findings that the lands in fact were receiving more protection than before 1928, seems to have reached its result by reliance upon two assumptions, in addition to the factors in its decision which have already been discussed. First, it seems to have assumed that *in fact* the projected Boeuf Floodway was substantially complete and in operative condition at the time the suit was brought (R. 418–419). Second, and apparently alternatively, it seems to have assumed that *in law* the amount of work which had been done upon the projected

[25] It may be objected that the benefit to respondent's land from the levees on the Arkansas River is irrelevant because it was not done pursuant to the 1928 Act, but under the general authority of the Mississippi River Commission (See R. 362). The premise of the argument could be admitted, since apart from the levees respondent's land was nevertheless given additional protection by the cut-offs and channel stabilization, which were a part of the project contemplated by the Act (R. 362). We believe, however, that when the taking is asserted upon the basis of acts done by the United States rather than upon the basis of a plan alone, see *supra*, pp. 33–38, *all* acts done by the United States must be considered. It is wholly unrealistic to assert that a taking can occur because certain acts, taken alone, would impose an additional flood hazard upon respondent's land if, when taken together with other and contemporaneous acts directed at the same general end, the flood hazard has in fact been decreased.

Boeuf floodway was irrelevant because of work which had been done elsewhere on the Mississippi River under other parts of the Jadwin Plan. We submit that neither of these assumptions can be sustained.

3. *The Boeuf Floodway was never commenced.*—The District Court found that no work whatever had been done on the projected Boeuf floodway; that the riverside levee remained at the same grade as before; and that the guide levees had not been started or even definitely located (R. 359). Those findings are not, and cannot be disputed. They are completely at odds with the conclusion of the court below that the flooding of respondent's land had become a "fixed fact" instead of, as formerly, "a casual and incidental happening" (R. 416).

(a) The court below sought to avoid the force of these findings by asserting that the guide levees were not necessary features of the project (R. 419). That assertion, we submit, was erroneous. The essential character of the guide levees may be seen from a comparison of the situation of respondent's land with that of other land in the Boeuf Basin but not within the bed of the projected floodway. Respondent will probably admit that no floodage easement has been taken with respect to land of the latter sort. Yet respondent's land differs only in that *if the guide levees had been built*, it would have been overflowed by the greater volume and depth of water which the guide levees would have prevented

from spreading out over the whole of the Tensas Basin. So far as the present case is concerned, it is unnecessary to discuss whether the United States would be liable if the levees had been built.[26] Here, since the guide levees have not been built, or even begun, no greater burden is imposed upon respondent's land than is imposed upon any other alluvial land in the Tensas Basin.[27] The *Jackson* case is conclusive.

Any contention to the contrary leads to a wholly untenable situation. If the guide levees are immaterial and unnecessary to the project, as the court below assumed (R. 419), because "they would serve merely to limit the quantity of the lands subject to diversion overflow," the Government would seem compelled, if the decision below be good law, to purchase flowage rights over all alluvial land in the Tensas Basin; for even if confining guide levees

[26] As stated *supra*, p. 47, the court below in *Danforth* v. *United States*, 105 F. (2d) 318, decided subsequently to the present case, and the Court of Claims in *Matthews* v. *United States*, 87 C. Cls. 662, held that the increase in the quantity and depth of the water occasioned by guide levees did not amount to a taking.

[27] Furthermore, Section 1 of the Act, *infra*, p. 79, contains the specific direction that "all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands." This provision was explained by the managers of the bill in the House of Representatives as intended to provide that "diversion works shall be constructed so as to control and confine the volume of water taken from the main channel of the river." 69 Cong. Rec. 8211. The conclusion is compelled, therefore, that the guide levees are essential features.

were eventually to be constructed, all the land outside the floodway could plausibly be argued already to have been taken and the liability of the Government fixed. It cannot be thought that such a result is intended by the Fifth Amendment.

The matter may be stated in terms of degrees. Every improvement in levees which adds protection to any land against floods increases, *pro tanto*, the severity of the floods elsewhere. For example, if the United States were to erect a high ring of levees around Arkansas City, the amount of floodwater which would flow over respondent's land in time of flood would be increased, although in slight degree, and the same effect would occur, to a greater or lesser degree, the whole distance down the river. Certainly, however, the United States would not be required to pay for floodage easements because of that effect. That is the most extreme situation. The *Jackson* case carried it a step further. There additional high levees on the opposite side of the river, and upstream on the same side of the river, resulted inevitably in increasing the amount of water which in a flood would flow over the plaintiff's land, and also in increasing the probability that a crevassing would occur in the levee protecting the plaintiff's land. There, too, the increased likelihood of flooding was held insufficient to subject the United States to liability. That decision goes beyond the present case, for here the land is in fact receiving greater

flood protection than before. Finally, had the floodway been completed, the question would have been still different. Then a relatively narrow strip of land would be converted into a floodway to protect other land, some of it immediately adjacent. Whether, in that situation, the servient land would be entitled to claim compensation for the sacrifices is a perhaps more difficult question, and one which turns on the factual increase in flood hazard. It is, however, a question which the present case does not present.[25]

(b) It may, moreover, be noted that the conclusion of the court below that the Boeuf Floodway was substantially complete assumes that a completed fuse-plug levee exists. The District Court found, as we have already stated, that the levee had been left at its original 1914 grade for a distance of 60 miles on the west side of the river from Yancopin to Vau-

[25] It should also be pointed out that the conclusions of the court below that guide levees are "immaterial details" (R. 418) is inconsistent with its further conclusion that the projected Boeuf Floodway has not been abandoned under the Act of June 15, 1936, *infra*, p. 89, because the Eudora Floodway is not in operative condition (R. 419). The only difference between the two floodways is the area subject to overflow. That area is determined by guide levees, since the projected point of entry for the floodwaters is practically the same in each instance. Therefore, if the Boeuf Floodway was complete without guide levees, so was the Eudora Floodway, on the date when the act authorizing it was approved. The conclusion as to the Eudora Floodway is patently untenable, but is inevitable if the court below was correct.

cluse (R. 379) instead of for only 30 miles from Rohwer to Luna Landing, as contemplated by the Jadwin Plan. Physically, therefore, the riverside levee, retained at its original grade, bore little resemblance to the fuseplug which was planned.

But the existence of a fuse plug is not solely a matter of physical fact. If it were, any section of the levees on a river which was lower than other sections could be called a fuse-plug, and, apparently, under the decision below, could be used as a basis for a claim of taking of floodage rights over lands behind it. A fuse-plug, rather, is a section of the levee which is *intended* to be overtopped by water at a flood stage. H. Rep. No. 1072, Comm. on Flood Control, 70th Cong., 1st Sess., pp. 371, 372. It is the purpose for which it is to be used, not merely the physical characteristic as a lower levee, which creates a "fuse-plug."

Until the guide levees are completed, there is no purpose to have the floodwaters go over the fuse-plug. The fact that the unraised levee is some 27 miles longer than the contemplated fuse-plug (R. 357) indicates that there is no present purpose to divert floodwaters. Compare Section 1 of the 1928 Act, which provides that "pending *completion* of the floodway" the land within it—

> shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway.

We submit, therefore, that in the absence of the completed and confined fuse-plug levee, or the guide levees, or, for that matter, either of the two, the court below erred in asserting that the projected Boeuf Floodway was in operative condition.

4. *The other work on the river does not in law mean that respondent's land is taken.*— The court below also seems to have taken the position that notwithstanding the facts with reference to the projected Boeuf Floodway, the United States was none the less liable because it had done other work on the Jadwin Plan elsewhere on the river. On that basis, for example, it sought to distinguish *Jackson* v. *United States*, 230 U. S. 1, *supra*, pp. 43–44 (R. 420). Here we believe that it again fell into error.

The District Court made a finding on this issue as well. It found that the projected Boeuf floodway was a separate and independent project (R. 358). That finding was simply ignored by the court below. On the contrary, it seems to have believed that the whole Jadwin Plan must be taken as a unit, with the consequence that because the whole plan was 80 per cent complete, at the time suit was begun (R. 418), the United States had taken the floodage easements even in the incomplete parts. That, we believe, can not be the law.[29]

[29] The subsequent decision of the court below in *Danforth* v. *United States*, 105 F. (2d) 318, discussed, *supra*, p. 47, is inconsistent with its apparent stand on this point in the instant case, since in the *Danforth* case it held that no

Accepted literally, the conclusion of the court below means that the United States would have taken an easement of flooding over respondent's land even if its work under the 1928 Act had been confined to the strengthening of levees hundreds of miles below the Boeuf project—work which would not have affected respondent's land at all, or if its work had been confined to the cut-offs and channel stabilization in the middle section of the river—work which gave greater protection to respondent's land. Probably the court would not have been willing to go so far. But even if the court meant that the taking occurred because, pursuant to a plan, the levees were raised at certain points in the middle section of the river, we submit that its conclusion can not be accepted.

As we have seen above (pp. 33–39) no taking occurs simply because of the adoption of a plan. And also, as we have seen (pp. 50–55), no work was done on the projected Boeuf project itself. Consequently, the court's position necessarily means that the acts of the United States, which would subject it to no liability, if the Boeuf project had, for example, been suggested and adopted subsequent to the main Jadwin Plan, or as a separate undertaking, subject it to that liability when it is incorporated in the general plan.

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flowage easement had yet been taken with respect to land in the Bird's Point-New Madrid floodway, although that floodway was likewise part of the Jadwin Plan. *Matthews v. United States*, 87 C. Cls. 662, is similarly contrary to the decision below in the present case upon this point.

So stated, we believe that the argument is directly contrary to *Willink* v. *United States*, 240 U. S. 572, *supra*, p. 34. There, too, a plan existed. There too acts were done pursuant to the plan—the passage of an appropriation act, the letting of a contract, the interference with the structures on the land below the high-water mark. But there the Court denied liability because the upland, for which compensation was sought, had been subjected to no interference.

The Constitution, in other words, adopts no deterministic doctrine that a plan to take crystallizes, or becomes equivalent in law to a completed taking, when the first shovelful of earth is turned. There must at least be work on the project which constitutes an actual interference with the landowner's property rights."

Moreover, the rule adopted by the court below is, as a practical matter, absurd. Liability is made to rest upon the fact that a general plan is enacted. Presumably, liability could be avoided by consider-

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[30] Conceivably, the work could be such that it would make the interference inevitable, even though the acts themselves did not constitute an interference. Completion of a dam which would, in five years, back up water onto a plaintiff's land, might, for example, be a taking even before the water reached that land. Compare *High Bridge Lumber Co.* v. *United States*, 69 Fed. 320 (C. C. A., 6th) and *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. (2d) 297 (C. C. A., 8th), with *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. (2d) 161 (C. C. A., 7th) (1937), certiorari denied 302 U. S. 714.

ing each flood-control device and project separately, and examination of the Jadwin Report will reveal that each project was dealt with separately. But certainly Congress is not to be held to have incurred the tremendous burden of liability which the decision below suggests or declares simply because it adopted the obviously sensible device of considering the various projects in relation to each other. A decision placed on such a ground would seem to drive Congress into a policy by which its flood-control program would be enacted in fragmentary bits, integrated only by accident or tacit design.

5. *Respondent's Apprehension Is Not a Government Taking.*—Respondent does not assert that her land has been interfered with or flooded. The trial court has found that her present protection is better than before 1928. Her position, in essence, is that *if* there is a flood of sufficient proportions, then her land will more certainly be flooded than that protected by the raised levees, or (contrary to fact) more certainly than was the case before the 1928 Act. In other words the taking for which suit is now brought is supposed to be accomplished simply because of respondent's apprehension of a future taking.

Such an apprehension does not warrant the recovery of compensation. *Peabody* v. *United States,* 231 U. S. 530; *Court of Marion County, W. Va.* v. *United States,* 53 C. Cls. 120, 150–151; *Kirk* v. *Good,* 13 F. Supp. 1020, 1021 (E. D. Mo.); *High*

Bridge Lumber Co. v. *United States,* 69 Fed. 320 (C. C. A., 6th). Here, there was no more than that. As was pointed out above (p. 54), by express mandate of Congress the land of the respondent was to retain protection equal to other land on that side of the river but not in the floodway, until the floodway was *complete.*[31] That protection has been given, and, indeed, is protection greater than the land possessed prior to 1928. Here, therefore, the work done did not interfere with the respondent's land, any more than with the nearby lands for which the Jadwin Plan could not create even an apprehension of future taking. Consequently, under the doctrines of the *Willink* and other cases cited above, no taking has yet occurred.

Our position is reinforced by the decisions of this Court in a group of three cases involving a gun emplacement at Portsmouth, New Hampshire. *Peabody* v. *United States,* 231 U. S. 530, is the first case in this series. A battery and fort had been constructed in Portsmouth Harbor. In 1902 two of the guns in the battery were fired over the plaintiff's land, on two different occasions. The land admittedly lay within the most suitable line of fire.

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[31] In view of the Congressional mandate, any attempt by respondent to prove that it had been violated would necessarily only be proof that the officers of the United States were acting in excess of their authority. In that event no liability can be asserted against the United States under the Fifth Amendment. *Hughes* v. *United States, supra; Hooe* v. *United States,* 218 U. S. 322; *Mitchell* v. *Harmony,* 13 How. 115; *Dougherty* v. *Galliher,* 26 F. (2d) 538 (App. D. C.).

It was conceded that the apprehension of firing caused material depreciation of the value of the land and of the improvements on it, since the property was operated as a resort. The plaintiff's counsel there argued (p. 533) that "It cannot possibly be said that with this menace constantly threatening the claimants' land, materially and permanently impairing its value, their rights of use, exclusion and disposition, have not been so seriously interfered with as to constitute a taking." This Court did not agree. In its decision rejecting the claim, it stated (p. 540):

> Reduced to the last analysis, the claim of the petitioners rests upon the fact that the guns were fired upon two occasions in 1902, as stated, and upon the apprehension that the firing will be repeated. That there is any intention to repeat it does not appear but rather is negatived. There is no showing that the guns will ever be fired unless in necessary defense in time of war. We deem the facts found to be too slender a basis for a decision that the property of the claimants has been actually appropriated and that the Government has thus impliedly agreed to pay for it.

Six years later, in 1919, the plaintiff in the *Peabody* case once more came before this Court, complaining of "occasional subsequent acts of gunfire," and the Court saw no occasion to change its view. *Portsmouth Harbor Land & Hotel Company* v. *United*

States, 250 U. S. 1. In 1928 this controversy was finally resolved. The old battery had been dismantled and new, long-range coast defense guns were installed. A fire control was established. The guns were fired. The petition, the allegations of which had been admitted by demurrer, ascribed to the United States the intent to continue to fire the guns. This Court held (*Portsmouth Co.* v. *United States*, 260 U. S. 327, 330):

> The repetition of those acts through many years and the establishment of the fire control may be found to show an abiding purpose to fire when the United States sees fit, even if not frequently, or they may be explained as still only occasional torts. That is for the Court of Claims when the evidence is heard.

On a remand to the Court of Claims for a determination of whether there was an "abiding purpose" to fire the guns, the petition was dismissed, 64 C. Cls. 572, and certiorari was denied, 277 U. S. 603.

The present case is an *a fortiori* one. In those cases it was held that no taking had occurred even though there had been some actual interference and much actual harm. Here, to the present time, there has been no interference and no harm, but rather benefit, from the action of the United States. In those cases, too, the Court held that no taking could occur until an "abiding purpose" to assume the dominion over the land could be proved, and it was not proved even by actual trespasses. Here,

on the contrary, Congress has expressly stated in Section 1 of the Act that it does *not* have any purpose to interfere with respondent's land until the floodway is completed, and, moreover, by the 1936 Act has expressly abandoned the whole project. Apprehension itself cannot constitute a taking if apprehension and trespasses taken together do not.

III

SECTION 4 OF THE 1928 ACT DOES NOT CREATE ANY ADDITIONAL LIABILITY ON THE PART OF THE UNITED STATES

The court below seems to have based its decision upon the provisions of the Fifth Amendment, rather than upon the Act of May 15, 1928. It did refer to Section 4, however (R. 412, 420), and respondent apparently relies upon it. We believe that it does not in any way affect the liability of the United States in the present case.

A. *Section 4 Is Merely a Direction to Federal Officers*

Section 4 (*infra*, p. 83) provides in part:

> The United States shall provide flowage rights for additional destructive floodwaters that will pass by reason of diversions from the main channel of the Mississippi River: * * * The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinion of the Secretary of War and of the

> Chief of Engineers, are needed in carrying out this project, * * *.

The section does not purport either to create any liability or to authorize suits against the United States. It is plainly nothing more than a direction to the officers of the United States to acquire such flowage rights or easements as they may deem necessary before any "additional destructive floodwaters * * * pass by reason of diversions." If, indeed, it be construed to create a liability beyond that implied by the Constitution, Section 4 would seem to be in irreconciliable conflict with Section 3, which provides that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

If Section 4 were intended to *create* a liability in the United States, quite different language would have been used. (a) It would doubtless have stated expressly that the United States should be liable for the damage. (b) It would have described with particularity the type of injury or apprehension which was not protected under the Fifth Amendment but which was intended to be compensated under the Act. (c) It would, one supposes, have fixed some measure of the new liability, since the amount of the compensation would, by definition, not be fixed by prior practice or decisions.

Instead, the section speaks merely of "flowage rights for additional destructive floodwaters."

The terseness of the language indicates a reference to a well-understood concept, the just compensation provided by the Constitution for property permanently acquired or interfered with by the Government. That liability, it is true, would have existed without Section 4. But this by no means implies that the section was meaningless.

The United States could acquire the flowage rights either by condemnation or by first taking them and subsequently meeting its liability to the owners. Section 4 was plainly intended to control this discretion which otherwise would have existed in the officers: if the plans called for a taking of the flowage rights, they must be provided before the floodways are put into operation.

The legislative history is discussed in more detail below. It is sufficient here to note that the present language originated in an amendment on the floor of the House. It was sponsored by Representative Reid of Illinois (69 Cong. Rec. 7030), who had a rather dramatic conception of the proposed floodways, and was insistent that flowage rights be acquired in advance. He said (69 Cong. Rec. 7000; see also pp. 7105, 7106):

> I will never propose an amendment or support any section of this bill which will permit the turning down on innocent people in these so-called floodways of a torrent three times that of Niagara Falls *without first acquiring* the right-of-way or the flowage rights; * * *. [Italics added.]

The Congressman seems plainly to have viewed his amendment as requiring a prior condemnation of land to be flooded. Such, we submit, is the sole purpose of the first paragraph of Section 4.

The first paragraph of Section 4 must, moreover, be read with the second; when this is done, its purpose as a direction to acquire flowage rights prior to flooding becomes plain. The second paragraph authorizes the Secretary to initiate proceedings to acquire the rights which are necessary to the project, in his opinion and that of the Chief of Engineers. If Section 4 raised a liability in the United States on suit by the landowners, there would be no occasion to direct the Secretary of War to acquire these rights.

Indeed, the requirement that the proceedings be instituted with respect to lands "which, in the opinion of the Secretary of War and of the Chief of Engineers, are needed in carrying out this project" was added to the earlier draft of the bill because, without it, the paragraph "does not specify who is to determine what land is necessary to be acquired."[4] This plainly implies that the section was designed merely as a direction to federal officers, and not intended to create a liability in suits determined by landowners to be brought.

Since the projected Boeuf Floodway has never been begun, and the United States does not plan

[4] H. Rept. No. 1100, 70th Cong., 1st Sess., p. 6; see also H. Rept. No. 1555, 70th Cong., 1st Sess., p. 5.

any present diversion of waters over respondent's land, nothing in the section requires action on the part of its officers. And, certainly, if that be the case, there are no rights in the respondent created by implication.

B. *If Section 4 Does Relate to the Liability of the United States It Is Inapplicable Here*

It seems plain that Section 4 is simply a direction to federal officers to condemn rather than to take by flooding. But even if it were assumed that the section related to a substantive liability of the United States, it clearly is not applicable to this case.

1. *The Language of the Statute.*—Section 4 provides, in its essential clause, that "The United States shall provide flowage rights for additional destructive floodwaters that will pass by reason of diversions from the main channel of the Mississippi River." By its terms, the section is inapplicable to this case for any of three reasons.

(a) The section directs acquisition of flowage rights only when waters will pass *by reason of diversions from the main channel.* "Diversion" plainly means a purposeful and deliberate change in the course of the water; it is uniformly defined as *the act* of turning aside from a course.[33] As such, the section plainly relates to the controlled

[33] Webster's New International; Funk & Wagnalls New Standard; Century Dictionary and Cyclopedia; Murray's New English.

spillways contemplated by the plan,[14] and quite possibly covers also the consequential increased flooding deliberately caused by other work combined with the failure to raise levees beyond their existing height. Whether or not inaction, in the latter circumstances, would be a "diversion," it plainly is not where the inaction combined with work elsewhere does not in fact cause water to be diverted or increase the danger of flooding.

(b) Section 4 is applicable only in the case of *additional destructive floodwaters.* Before the section could be thought to be a direction to acquire flowage rights, the land would have to be subject to destructive floodwaters and the waters would have to be additional to the floods theretofore passing over the lands. It is conjectural whether the lands are now subject to *any* flooding; it is certain that they are not subject to *additional* floods. The land was flooded in 1912, 1913, 1919, 1921, 1922, and 1927; it has not once been flooded since 1928 (*supra,* pp. 4, 11).

(c) Section 4 operates only when the waters *will* pass over the lands. The flooding must, therefore, be at least reasonably predictable. None can be sure that the land will again be flooded. The dredging and channel straightening were shown in 1937 greatly to have increased the carrying capacity

[14] Jadwin Report, pars. 97, 114 (H. Rep. No. 1100, pp. 79, 82–83; Sen. Rep. No. 619, pp. 33, 36–37; each 70th Cong., 1st Sess.).

of the river (*supra*, pp. 9–10). The modification of the Flood Control Plan in 1936 inaugurated more extensive construction of reservoirs which, together with continued channel stabilization, may be expected substantially to reduce flood stages.[35] The Flood Control plans, it is true, call for eventual construction of the Eudora floodway guide levees, but this precaution against a flood of gigantic proportions does not make the flooding any the less conjectural.

2. *Legislative History of Section 4.*—The language of the statute, therefore, is clear evidence that it is inapplicable here. If more be needed, the legislative history offers ample confirmation. This history is intelligible only if the successive changes in Section 4 be kept clearly in mind. We shall, therefore, first sketch the broad developments in Section 4.

(a) The Jadwin Report included no estimates for damage to lands in the floodway, because, *inter alia*, except for the Birds Point and Bonnet Carre Floodways, the lands would have the same protection as under the then existing system. The report thought the states and localities should acquire the land in those floodways (Par. 32). The bill as reported to the Senate (69 Cong. Rec. 5483)

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[35] Act of June 15, 1936, *infra*, p. 88; Report of Chief of Engineers, February 12, 1935, H. Doc. No. 1, 74th Cong., 1st Sess., pars. 39, 43.

simply enunciated, in detailed form, that just compensation should be paid for property taken.[36] Section 4 was reported out by the House Committee with no change here material (69 Cong. Rec. 6665). On the floor the Section was amended; the amendment was introduced by Mr. Reid. It provided, in essence, that the Government should provide rights-of-way in lands "over which destructive floodwaters will pass by reason of diversion of the main channel" (69 Cong. Rec. 7030–7031).[37]

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[36] "SEC. 4. Just compensation shall be paid by the United States for all property used, taken, damaged, or destroyed in carrying out the flood-control plan provided for herein, including all property located within the area of the spillways, floodways, or diversion channels herein provided, and the rights-of-way thereover, and the flowage rights thereon, and also including all expenditures by persons, corporations, and public-service corporations made necessary to adjust or conform their property, or to relocate same because of the spillways, floodways, or diversion channels herein provided: *Provided*, That in all cases where the execution of the flood-control plan results in benefits to any person, or persons, or corporations, municipal or private, such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid."

The chief purpose of the provision seems to have been to afford a vehicle for the requirement that compensation be offset by benefits (69 Cong. Rec. 5487).

[37] The amendment struck out all of the first paragraph of Section 4 and substituted therefor: "The United States shall provide lands for rights-of-way over which destructive floodwaters will pass by reason of the diversion of the main channel of the Mississippi River, and for levees along such diversions, floodways, and spillways, and any lands, easements, flowage rights, or right-of-way necessary to control and regulate such diversion."

Mr. Frear was the leader of the opposition to the amendment, and opposed on the ground that it would subject the Government to unnecessary and tremendous cost in the purchase of lands or flowage rights throughout the floodways (69 Cong. Rec. 6657, 6660, 6779, 7000, 7107). The amendment was adopted (69 Cong. Rec. 7111). The first conference report made immaterial changes (69 Cong. Rec. 7778). The second report, however, added the important word "additional" to the description of the destructive floodwaters (69 Cong. Rec. 8119). Mr. Frear expressed himself as wholly satisfied. He said (69 Cong. Rec. 8120–8121):

> * * * The chairman of the committee will correct me if I am not stating this correctly. That word provides, in effect, that in these floodways, where they have been used heretofore for floodways, no damage can be collected from the Government unless it is "additional" damage due to the construction of levees. Where use of the floodways creates additional overflow because of greater floods caused by the works, then the Government might properly be held responsible to the extent of providing land for such additional overflow or flowage rights. * * * Of course, the effect of this change is to strike out the enormous expenditure of two or three hundred million dollars for buying up whole floodways that we have had in the bill heretofore.
>
> * * * * *

> * * * This was an indefensible objection to the Senate and House bill which is now eliminated.

Mr. Reid agreed, and said (69 Cong. Rec. 8122):

> * * * I think we have the language corrected to meet the views of nearly everyone in the House. The United States will not now have to pay for flowage rights over lands now used in conducting the destructive water from the main Mississippi River. It was cured very simply by the addition of the word "additional." If the work puts any additional flood destruction on those lands, that must be provided for. * * *

It is plain, therefore, that the bill as passed directed acquisition of flowage rights only where additional damage was to be caused. This damage, we think, might result either from flooding lands which were not flooded before or from increasing the destructive volume of the floods. In either event, Section 4 is wholly inapplicable to this case. The lands of the respondent have better flood protection than before inauguration of the plan; there is neither additional damage to the lands nor "additional destructive floodwaters" passing over them.

Much of the debate on the original Reid amendment envisaged a broader direction,[38] but as both

[38] See 69 Cong. Rec.: Mr. Reid (pp. 7000–7001, 7105, 7106); Mr. Frear (pp. 6657, 6660, 7000, 7107); Mr. Kopp (p. 6712); Mr. Cox (p. 7107).

Mr. Reid and the opposition recognized, the draft of the conference committee accomplished quite a different thing. However, two further points may be made: at all stages of debate it was recognized that the section related only to a deliberate diversion by the Government; and even when the bill was in its original form, and certainly in its amended form, it was recognized that the Government should be liable only in the event of actual or reasonably certain damage.

(b) There are many indications that the Reid amendment, even in its original form, was intended to apply only when the diversion was deliberate.[39]

(It is, therefore, inapplicable here (*supra,* pp. 66–67).)

(c) It is equally plain that the amendment was never intended to do more than to direct acquisition of flowage rights where the damage from the Flood Control plan was certain or reasonably predictable. Mr. Reid many times made plain that his amendment related only to cases where property was *destroyed* by floods resulting from the Government's work (69 Cong. Rec. 6792, 7105); he also stated that it referred only to floodways created by

[39] Mr. Reid many times speaks of offering protection against "turning destructive floodwaters down upon innocent people" (69 Cong. Rec. 7000, 7001, 7105, 7106); again, he refers to the liability of the Government "where it diverts the water from the main channel" (69 Cong. Rec. 7001, 7105). Mr. Cox refers to "the turning in of this additional water" (69 Cong. Rec. 7106). Senator Wilson, speaking of the amendment as it left the conference, said that it referred to the water "which is deliberately diverted on the plans of the Government" (69 Cong. Rec. 8211).

virtue of this work, and did not reach natural floodways (69 Cong. Rec. 7000, 7001, 7105). Mr. Cox, in defending the amendment after expiration of the time of Mr. Reid, was even more explicit. He said (69 Cong. Rec. 7106–7107):

> * * * It simply means that where the turning in of this additional water inundating land not heretofore subject to overflow, the Government shall acquire flowage rights thereto.
>
> * * * * * * *
>
> * * * The amendment simply proposes that when the land is flooded that has not heretofore been subject to flood, the Government may acquire flowage rights.
>
> * * * * * * *
>
> Except such lands the value of which is perpetually destroyed by the Government, * * * the Government does not commit itself by this proposal to buy anything except the land for levee rights-of-way. * * *

Here there has been no additional or actual damage to the land in the Boeuf Floodway; indeed, its flood protection has been enhanced.

C. *Ratification by Congress*

Even if the statute were ambiguous, which it is not, the question has been put beyond dispute by the Act of June 15, 1936, *infra*, ratifying the administrative construction.

The orders of the President approving the projects also approved the purchase of flowage rights in the Birds Point and Bonnet Carre Floodways (November 21 and December 11, 1928). But the orders approving the Boeuf and Atchafalaya floodways, where no reduction in levee grades was proposed, made no mention of flowage rights (January 10 and 16, 1929).

The Report of the Chief of Engineers of February 12, 1935, transmitted to Congress, surveyed the work done under the Flood Control Act of 1928 and recommended certain modifications. Comm. Doc. No. 1, H. Comm. on Flood Control, 74th Cong., 1st Sess. It stated (par. 7) that the Government was acquiring flowage rights in the Birds Point Floodway—where levees were being cut down and flood protection reduced—and stated that the original plan "did not provide for the Federal compensation of land owners in the Boeuf and Atchafalaya Floodways where no reduction in the then existing heights of the protecting levees was proposed" (par. 17). The general principle was stated (par. 17) as follows:

> * * * No compensation has been paid landowners except where the protection that they previously enjoyed has been or will be reduced by the lowering of the levees under the plan. * * *

The Report of the Chief of Engineers summarized the recommendations of the modifications in

Section 43. The Act of June 15, 1936, *infra*, p. 89, in Section 1 provided:

> That the project for the control of floods of the Mississippi River * * * is hereby modified in accordance with the recommendations of section 43 of the report submitted by the Chief of Engineers to the Chairman of the Committee on Flood Control, dated February 12, 1935, and printed in House Committee on Flood Control Document Numbered 1, Seventy-fourth Congress, first session, as hereinafter further modified and amended; and as so modified is hereby adopted and authorized and directed to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers.

The Act of June 15, 1936, was passed in recognition of the prior administrative construction under which the landowners in the Boeuf Floodway would receive no payment. It did not change the language of Section 4; indeed, it specifically adopted the engineering modifications suggested by the Chief of Engineers in the report which called attention to the practice adopted with respect to these lands. The Act is, therefore, a ratification of the principle that compensation is to be paid only when the levees are reduced so that flood protection is in fact diminished. See *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 301–302; *Mason Co.* v. *Tax Commission*, 302 U. S. 186, 208.

Section 12 of the 1936 Act, *infra*, pp. 91–92, it may be noted, does not reduce the force of the Congressional ratification. It rejected the proposal of the Chief of Engineers that flowage rights and levee rights-of-way be supplied by local property owners or governments, and provided instead that payment was to be made by the United States. The section continued:

> no money appropriated under the authority of this Act shall be expended upon the construction of the Eudora floodway * * * the back protection levee extending north from the Eudora Floodway * * * until 75 per centum of the value of the flowage rights and rights-of-way for levee foundations, as estimated by the Chief of Engineers, shall have been acquired * * *

Nothing in this section indicates that "flowage rights" are to be construed differently than theretofore; indeed, the Chief of Engineers is authorized to determine when 75 per cent of the necessary rights have been acquired. The Senate Commerce Committee, in reporting the bill (S. Rpt. no. 1662, 74th Cong., 2d Sess., pp. 8–11), made perfectly plain that Congress, as did the Chief of Engineers, intended to pay only the just compensation required by the Constitution.[40]

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[40] The House Committee on Flood Control shortened the Senate committee's discussion and is, therefore, less explicit. But it contains nothing to contradict the Senate interpretation. H. Rept. No. 2583, 74th Cong., 2d Sess., pp. 9–10.

CONCLUSION

We submit, therefore, that neither under the statute nor under the Constitution is respondent entitled to recover. The decision of the Circuit Court of Appeals should be reversed, and the decision of the District Court should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

WARNER W. GARDNER,
PAUL A. SWEENEY,
Special Assistants to the Attorney General.

CHARLES A. HORSKY,
Special Attorney.

AARON B. HOLMAN,
Attorney.

SEPTEMBER 1939.

APPENDIX

Act of July 18, 1918, c. 155, 40 Stat. 904, 911:

SEC. 5. That whenever the Secretary of War, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights-of-way needed for a work of river and harbor improvement duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights-of-way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress: *Provided*, That certain and adequate provisions shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that such compensation may be promptly ascertained and paid.

SEC. 6. That in all cases where private property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement, and shall render their award or verdict accordingly.

The Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (U. S. C., Title 33, Sec. 702a *et seq.*) provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: *Provided,* That a board to consist of the Chief of En-

gineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project, is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: *Provided,* That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further,* That pending com-

pletion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of $325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13.

SEC. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately $292,000,000, heretofore made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce,

and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such

stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

SEC. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided,* That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at

such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights-of-way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights-of-way needed for works of flood control: *Provided,* That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.

* * * * *

SEC. 8. The project herein authorized shall be prosecuted by the Mississippi River Commission under the direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems. The president of the commission shall be the executive officer thereof and shall have the qualifications now prescribed by law for the Assistant Chief of Engineers, shall have the title brigadier general, Corps of Engineers, and shall have the

rank, pay, and allowances of a brigadier general while actually assigned to such duty: *Provided,* That the present incumbent of the office may be appointed a brigadier general of the Army, retired, and shall be eligible for the position of president of the commission if recalled to active service by the President under the provisions of existing law.

The salary of the president of the Mississippi River Commission shall hereafter be $10,000 per annum, and the salary of the other members of the commission shall hereafter be $7,500 per annum. The official salary of any officer of the United States Army or other branch of the Government appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by, or which shall be fixed under, the terms of this Act.

SEC. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

SEC. 10. That it is the sense of Congress that the surveys of the Mississippi River and its tributaries, authorized pursuant to the Act of January 21, 1927, and House Document Numbered 308, Sixty-ninth Congress, first session, be prosecuted as speedily as practicable, and the Secretary of War, through the Corps of Engineers, United States Army, is directed to prepare and submit to Congress at the earliest practicable date projects for flood control on all tributary streams of the Mississippi River system subject to destructive floods which projects shall include: The Red River and

tributaries, the Yazoo River and tributaries, the White River and tributaries, the Saint Francis River and tributaries, the Arkansas River and tributaries, the Ohio River and tributaries, the Missouri River and tributaries and the Illinois River and tributaries; and the reports thereon, in addition to the surveys provided by said House Document 308, Sixty-ninth Congress, first session, shall include the effect on the subject of further flood control of the lower Mississippi River to be attained through the control of the flood waters in the drainage basins of the tributaries by the establishment of a reservoir system; the benefits that will accrue to navigation and agriculture from the prevention of erosion and siltage entering the stream; a determination of the capacity of the soils of the district to receive and hold waters from such reservoirs; the prospective income from the disposal of reservoired waters; the extent to which reservoired waters may be made available for public and private uses; and inquiry as to the return flow of waters placed in the soils from reservoirs, and as to their stabilizing effect on stream flow as a means of preventing erosion, siltage, and improving navigation: *Provided*, That before transmitting such reports to Congress the same shall be presented to the Mississippi River Commission, and its conclusions and recommendations thereon shall be transmitted to Congress by the Secretary of War with his report.

The sum of $5,000,000 is hereby authorized to be used out of the appropriation herein authorized in section 1 of this Act, in addition to amounts authorized in the River and Harbor Act of January 21, 1927, to be expended under the direction of the Secretary

of War and the supervision of the Chief of Engineers for the preparation of the flood-control projects authorized to be submitted to Congress under this section: *Provided further,* That he flood surveys herein provided for shal' be made simultaneously with the flood-control work on the Mississippi River provided for in this Act: *And provided further,* That the President shall proceed to ascertain through the Secretary of Agriculture and such other agencies as he may deem proper, the extent to and manner in which the floods in the Mississippi Valley may be controlled by proper forestry practice.

SEC. 11. That the Secretary of War shall cause the Mississippi River Commission to make an examination and survey of the Mississippi River below Cape Girardeau, Missouri, (a) at places where levees have heretofore been constructed on the one side of the river and the lands on the opposite side have been thereby subjected to greater overflow, and where, without unreasonably restricting the flood channel, levees can be constructed to reduce the extent of this overflow, and where the construction of such levees is economically justified, and report thereon to the Congress as soon as practicable with such recommendations as the commission may deem advisable; (b) with a view to determining the estimated effects, if any, upon lands lying between the river and adjacent hills by reason of overflow of such lands caused by the construction of levees at other points along the Mississippi River, and determining the equities of the owners of such lands and the value of the same, and the commission shall report thereon to the Congress as soon as practicable with such rec-

ommendation as it may deem advisable: *Provided,* That inasmuch as the Mississippi River Commission made a report on the 26th day of October, 1912, recommending a levee to be built from Tiptonville, Tennessee, to the Obion River in Tennessee, the said Mississippi River Commission is authorized to make a resurvey of said proposed levee and a relocation of the same if necessary, and if such levee is found feasible, and is approved by the board created in section 1 of this Act, and by the President the same shall be built out of appropriations hereafter to be made.

SEC. 12. All laws or parts of laws inconsistent with the above are hereby repealed.

The Act of June 15, 1936 (c. 548, 49 Stat. 1508; U. S. C. Supp., Title 33, Sec. 702a–2, *et seq.*) amending the Flood Control Act of 1928, provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the control of floods of the Mississippi River and its tributaries, adopted by Public Act Numbered 391, approved May 15, 1928 (45 Stat. 534), Seventieth Congress, entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes", is hereby modified in accordance with the recommendations of section 43 of the report submitted by the Chief of Engineers to the Chairman of the Committee on Flood Control, dated February 12, 1935, and printed in House Committee on Flood Control Document Numbered 1, Seventy-fourth Congress, first session, as hereinafter further modified and amended; and as so modified is hereby adopted and

authorized and directed to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers.

SEC. 2. That the Boeuf Floodway, authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned as soon as the Eudora Floodway, provided for in Flood Control Committee Document Numbered 1, Seventy-fourth Congress, first session, is in operative condition and the back-protection levee recommended in said document, extending north from the head of the Eudora Floodway, shall have been constructed.

* * * * *

SEC. 4. That neither of the projects for the flood control of the Saint Francis River or the Yazoo River, hereby authorized, shall be undertaken until the States, or other qualified agencies, shall have furnished satisfactory assurances that they will undertake, without cost to the United States, all alterations of highways made necessary because of the construction of the authorized reservoirs, and meet all damages because of such highway alterations, and have agreed also to furnish without cost to the United States all lands and easements necessary to the construction of levees and drainage ditches constructed under this project; *Provided,* That the reservoirs for control of headwater flow of the Yazoo River system may be located by the Chief of Engineers, in his discretion: *And provided further,* That the Chief of Engineers may, in his discretion, substitute levees, floodways, or auxiliary channels, or any or all of them, for any or all of the seven detention reservoirs recommended in his report of February 12, 1935, for the control of floods of the Yazoo

River: *And provided further,* That the Chief of Engineers, with the approval of the Secretary of War, may modify the project for the flood control of the Saint Francis River as recommended in said report, to include therein the construction of a detention reservoir for the reduction of floods, and the acquisition at the cost of the United States of all lands and flowage necessary to the construction of said reservoir except flowage of highways: *Provided further,* That the estimated cost to the United States of the project is not increased by reason of such detention reservoir.

* * * * *

SEC. 10. After the Eudora Floodway shall have been constructed and is ready for operation, the fuse-plug levees now at the head of the Boeuf and Tensas Basins shall be constructed to the 1914 grade and the 1928 section. The fuse-plug levees at the head of the Atchafalaya Basin on the west side shall be constructed to the 1914 grade and the 1928 section. The fuse-plug levees at the head of the Atchafalaya Basin on the east side of the Atchafalaya River shall be constructed to the 1914 grade and 1928 section, and, after the Morganza Floodway has been completed, shall be raised to the 1928 grade as provided in section 3 of this Act. Thereafter those stretches of said levees which are left as fuse-plug levees shall be reconstructed and maintained as herein provided, subject to the provisions of section 3 of this Act. Any funds appropriated under authority of this Act may be expended for this purpose.

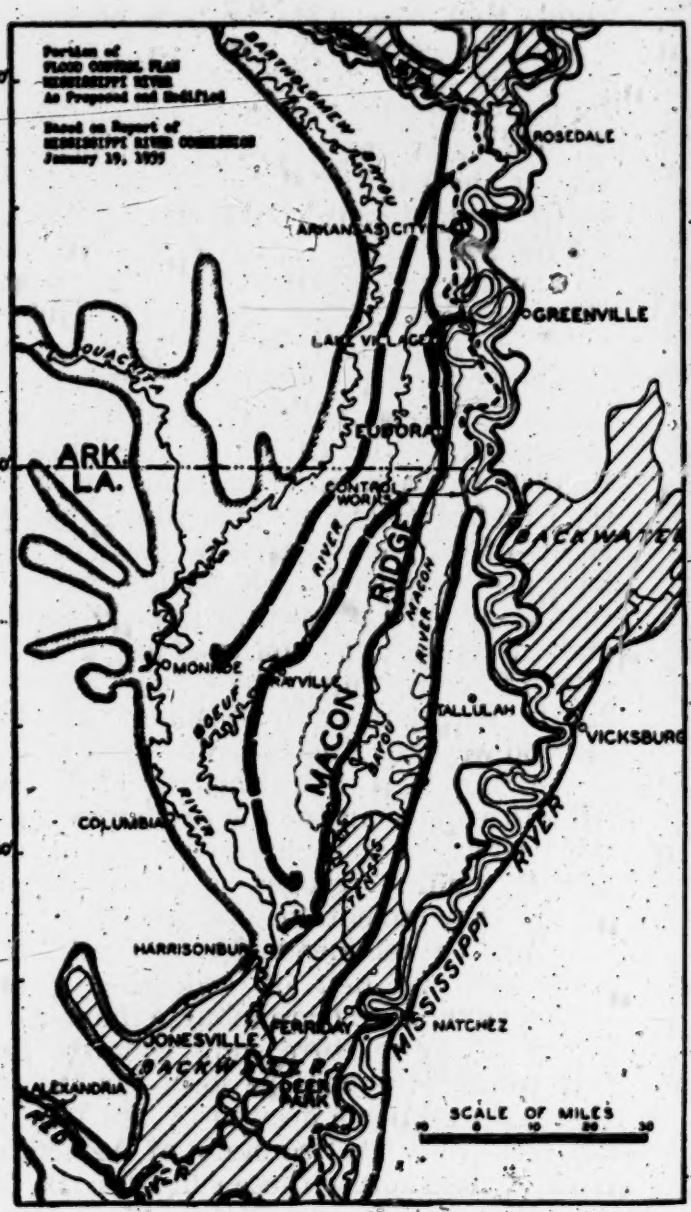
SEC. 11. That the back-protection levee north of the Eudora Floodway shall be constructed to the same grade and section as the levees opposite on the east side of the Mis-

sissippi River: *Provided,* That this levee extending from the head of the Eudora Floodway north to the Arkansas River shall be so located as to afford adequate space for the passage of flood waters without endangering the levees opposite on the east side of the river and shall be constructed contemporaneously with the construction of the Eudora Floodway; except that, until the Eudora Floodway is in operative condition, there shall be left in this back levee north of the head of the Eudora Floodway openings which shall be sufficient, in the discretion of the Chief of Engineers, to permit the passage of all flood waters to be reasonably contemplated in the event of any break in the riverside fuse-plug levee prior to the time the Eudora Floodway shall be in operative condition.

SEC. 12. In order to facilitate the United States in the acquisition of flowage rights and rights-of-way for levee foundations, the Secretary of War is authorized to enter into agreements with the States or with local levee districts, boards, commissions, or other agencies for the acquisition and transfer to the United States of such flowage rights and levee rights-of-way, and for the reimbursement of such States or local levee districts, boards, commissions, or other agencies, for the cost thereof at prices previously agreed upon between the Secretary of War and the governing authority of such agencies, within the maximum limitations hereinafter prescribed: *Provided,* That no money appropriated under the authority of this Act shall be expended upon the construction of the Eudora Floodway, the Morganza Floodway, the back protection levee extending north from the Eudora Floodway, or the levees extending from the head of the Morganza

Floodway to the head of and down the east bank of the Atchafalaya River to the intersection of said Morganza Floodway until 75 per centum of the value of the flowage rights and rights-of-way for levee foundations, as estimated by the Chief of Engineers, shall have been acquired or options or assurances satisfactory to the Chief of Engineers shall have been obtained for the Eudora Floodway, the Morganza Floodway, and the area lying between said back protection levee and the present front line levees; *Provided further*, That easements required in said areas in connection with roads and other public utilities owned by States or political subdivisions thereof shall be provided without cost to the United States upon the condition that the United States shall provide suitable crossings, including surfacing of like character, over floodway guide-line levees in said areas for all improved roads now constituting a part of the State highway system, and shall repair all damage done to said highways within the said floodways by the actual use of such floodways for diversion: *Provided further*, That when such portion of said rights as to all of said areas shall have been acquired or obtained and when said easements required in connection with roads and other public utilities owned by States or political subdivisions thereof have been provided as hereinabove set forth, construction of said flood-control works in said areas shall be undertaken according to the engineering recommendations of the Report of the Chief of Engineers dated February 12, 1935 (House Committee on Flood Control Document Numbered 1, Seventy-fourth Congress, first session), and the Secretary of War shall cause proceedings to be instituted for the

condemnation of the remainder of said rights and easements, as are needed and cannot be secured by agreement, in accordance with section 4 of the Flood Control Act of May 15, 1928: *Provided further,* That in no event and under no circumstances shall any of the additional money appropriated under the authority of this Act be expended for the acquisition of said 75 per centum of the flowage rights and rights-of-way hereinabove contemplated in excess of $20,000,000: * * * *Provided further,* That payment for rights-of-way, easements, and flowage rights acquired under this section, or reimbursement to the States or local interests furnishing them, shall be made as soon as the Chief of Engineers is satisfied that such rights-of-way, easements, or flowage rights have been acquired in conformity with local custom or legal procedure in such matters; and, thereafter, no liability of any kind shall attach to or rest upon the United States for any further damage by reason of diversions or flood waters: *And provided further,* That if the Secretary of Agriculture shall determine to acquire any of the properties within the floodways herein referred to, for national forests, wildlife refuges, or other purposes of his Department, the Secretary of War may, upon recommendation by the Chief of Engineers, in lieu of acquiring flowage rights, advance to or reimburse the said Secretary of Agriculture sums equal to those that would otherwise be used for the purchase of easements desired by the War Department and the Secretary of Agriculture is authorized to use these sums for the purpose of acquiring properties in the floodways in question.



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